Consolidation Coal Company *and* Mike P. Zemonick. Case 6-CA-13245

September 20, 1982

DECISION AND ORDER

On April 22, 1981, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the record and the attached Decision[1] in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

On February 18, 1980, Respondent's approximately 70 day-shift employees engaged in an unauthorized work stoppage in protest of Respondent's disposition of a grievance. Respondent subsequently discharged Union President Zemonick and Union Mine Committeemen Blair and Riggs for "insubordination, and instigation of an unauthorized work stoppage." No other (rank-and-file) employees who participated in the unauthorized work stoppage (i.e., in violation of a no-strike clause) were disciplined. Zemonick, Blair, and Riggs filed grievances over their discharges, and their cases were ultimately submitted to arbitration.

The arbitrator upheld the discharge of Zemonick on the grounds that Zemonick had instigated and led the unauthorized work stoppage. Since the instant complaint does not allege that Respondent acted unlawfully in discharging Zemonick, the propriety of Zemonick's discharge is not in issue in this case.[2]

The arbitrator reduced the discharges of Blair and Riggs to 30-day suspensions. Although he found that Blair and Riggs had in no way instigated or led the unauthorized work stoppage, he nevertheless found that:

> At first glance it might appear that [Blair's and Riggs'] transgressions were not greater than those of any other employee who participated in the Wildcat strike. However, an officer of a Local Union has a greater responsibility for observance of a no-strike rule than do the rank and file members.
>
> While [Blair's and Riggs'] actions did not constitute instigation of the Wildcat strike, they do serve to establish an abrogation of [their] responsibility as a Local Union Officer.

Respondent argues, as it did before the Administrative Law Judge, that the arbitration decisions involving Blair and Riggs should be deferred to under the guidelines for deferral first enunciated in *Spielberg Manufacturing Company*.[3] However, the Administrative Law Judge found that the awards in the arbitration decisions were repugnant to the purposes and policies of the Act, as interpreted in *Precision Castings Company*,[4] discussed *infra*, and thus failed to qualify for deferral under *Spielberg*.

For the reasons discussed more fully below we agree with the Administrative Law Judge that the arbitral awards in this case, upholding the disparate treatment of Blair and Riggs based on their status as union officers, are repugnant to the purposes and policies of the Act. Indeed, as will be seen, the results reached by the arbitrator, on the materially settled facts of this case, clearly contravene those purposes and policies. Accordingly, we affirm the Administrative Law Judge in his refusal to defer to the instant arbitration proceedings.[5]

Our dissenting colleagues, on the other hand, would defer to the arbitration proceedings.

Chairman Van de Water contents himself with a simple statement that, in his judgment, deferral is appropriate under *Spielberg Manufacturing Company*.

Member Hunter's plea for deferral, while more fully explicated than that of the Chairman, is equally unavailing. He proceeds from an erroneous assessment of what issue the arbitrator decided, and what reasoning the arbitrator applied in deciding that issue.

Member Hunter perceives that the arbitrator concluded that Respondent's disparate treatment of Union Committeemen Blair and Riggs was warranted by "their breach of their duty *inherent in the*

[1] In the first sentence of sec. III, C, of his Decision, the Administrative Law Judge inadvertently referred to Local 4060 herein as "Local 26." Also, two inadvertently erroneous case citations, in fns. 13 and 17, respectively, are corrected as follows: *Hammermill Paper Company*, 252 NLRB 1236 (1980), enfd. 658 F.2d 155 (3d Cir. 1981), and *Miller Brewing Company*, 254 NLRB 266 (1981), enfd. *sub nom. Szewczuga v. N.L.R.B.*, 110 LRRM 3289 (D.C. Cir. 1982).

[2] We note, however, our disagreement with Chairman Van de Water's suggestion that Zemonick did not mean it when he told the employees to go to work and that the employees therefore did not take him seriously. The Chairman points to scant evidence to support this curbstone psychoanalysis of Zemonick's intentions and the workers' understanding of the intentions. Indeed, the arbitrator to whom the Chairman so willingly defers in other respects, and who found Zemonick to have instigated and led the unauthorized work stoppage, makes no such finding and draws no such inference. In assessing the justifiability of Zemonick's discharge, the arbitrator merely discredited Zemonick's testimony that he *repeatedly* told the employees to go to work. We find it unnecessary to comment further, because Zemonick's discharge is not at issue here.

[3] 112 NLRB 1080 (1955).

[4] 233 NLRB 183 (1977).

[5] Moreover, as discussed more fully in fn. 6, *infra*, we find that the unfair labor practice issue in this case was neither presented to nor considered by the arbitrator. Thus, deferral to the instant arbitration proceedings must be denied on those grounds also. *Professional Porter & Window Cleaning Co., Division of Propoco, Inc.*, 263 NLRB No. 34 (1982).

collective-bargaining agreement." Thus, as Member Hunter sees it:

> The contractual issue decided by the arbitrator was whether the *collective-bargaining agreement* required a higher duty of union officers than employees to honor and to enforce the agreement's no-strike obligation. [Emphasis supplied.]

But contrary to Member Hunter's view of the arbitration proceeding in this case, the arbitrator's decision rested not on any notion of obligations inherent in the no-strike clause, nor in any other clause of the *collective-bargaining agreement*, but rather on obligations which the arbitrator found to be inherent in the *position of union officer itself.*[6]

In essence, Member Hunter and Chairman Van de Water make the same plea for deferral on the grounds that the arbitrator's award is not repugnant to the purposes and policies of the Act.[7]

In this regard, our dissenting colleagues are in initial agreement—both would overrule the Board's Decision in *Precision Castings Company, supra.* In that case, correctly relied upon by the Administrative Law Judge in declining to defer to the arbitration proceeding in this case, the Board found that the employer unlawfully singled out for punishment five union shop stewards who did no more than participate, along with other rank-and-file employees, in a plantwide unauthorized work stoppage. An employer is, of course, free to discipline particular employees, rather than all of those who participate in unauthorized work stoppages, *provided* that the criteria used in selecting employees for discipline is not related to their union activities. But in finding that the shop stewards in *Precision Castings* were punished unlawfully, the Board noted that the employer admitted singling out the shop stewards for punishment, from among their participating co-employees, because of their status as shop stewards and because they supposedly failed to abide by their contractual responsibility, as union officials, to take reasonable steps to terminate the unauthorized work stoppage. The Board rejected the employer's contention that shop stewards could be held to a greater degree of accountability for participating in the strike.

In *Gould Corporation*,[8] decided in direct reliance on *Precision Castings*, a union steward who did no more than participate in an unauthorized work stoppage along with approximately 50 other employees was singled out from among those other employees for special discipline. We found such discipline to be in clear violation of the Act, because the union steward was disciplined "not because of his actions as an employee, but because of his lack of actions as a steward," which we held to be a discriminatory and legally impermissible criterion for discipline under the Act.

Member Hunter castigates us for applying what he refers to as a *"per se"* rule to the circumstances in *Precision Castings* and *Gould*, accurately stated by Member Hunter as "when an employer imposed greater discipline on stewards than on rank-and-file employees for the same conduct in breach of a no-strike clause." If by that statement Member Hunter means to accuse us of consistently finding unlawful discrimination under such circumstances, then we accept his accusation with the full support of the express wording of the Act. Indeed, our explicit holding in *Precision Castings*—that discrimination directed against an employee on the basis of his or her holding union office is contrary to the plain meaning of Section 8(a)(3)—is a fundamentally unassailable restatement of, and gives clear meaning to the words of, the Act itself: "It shall be an

[6] Thus, while rejecting Respondent's contention that the failure of Blair and Riggs to *deter* the unauthorized work stoppage constituted their *instigation* of it, the arbitrator did conclude that, as union committeemen, Blair and Riggs had a greater responsibility than rank-and-file members to abstain from participating in the unauthorized work stoppage, and that they could therefore properly be treated more severely than rank-and-file employees for participating in an unauthorized work stoppage.

The arbitrator did not reach this conclusion by analyzing the effect of the no-strike clause on the participation of a union official in an unauthorized work stoppage. Rather, he relied on the holding of *union office itself* as affecting culpability for the participation of a union official in such activity. Accordingly, the arbitrator did not, contrary to Member Hunter's assertion, "conclude that the harsher discipline of the two union committeemen was thus warranted by their breach of their duty *inherent in the collective-bargaining agreement.*" (Emphasis supplied.)

Member Hunter also mischaracterizes the unfair labor practice issue in this proceeding. Thus, Member Hunter's assertion that "the arbitrator considered the issue alleged in the unfair labor practice proceeding" is incorrect. We have already noted the issue actually considered—and incorrectly resolved—by the arbitrator. Whether union officers have, inherent in their union positions, a greater responsibility than rank-and-file employees to refrain from participating in unauthorized work stoppages, so as to justify an employer's more severe treatment of them for doing no more than engaging in the same misconduct as rank-and-file employees. But the issue framed by the complaint allegations here is whether Respondent discharged Blair and Riggs because they engaged in protected concerted activities, and whether Respondent did so in order to discourage employees from joining or assisting the Union or engaging in protected concerted activities. This issue is markedly different from the issue considered by the arbitrator.

Accordingly, there is no basis for Member Hunter's willingness to defer to the arbitrator on the grounds of congruence between the arbitral and judicial issues.

[7] We reject Member Hunter's contention that the arbitrator's decision is not repugnant to the Act because the result reached by the arbitrator would not be contrary to results reached in Board decisions prior to *Precision Castings Company, supra*, discussed *infra*, or to results reached by courts of appeal which have disagreed with the Board's position in these matters. As discussed below, we find the arbitrator's decision fails, in any event, to accord with current court of appeals precedent.

Further, the question of whether to defer must be resolved on the basis of legal standards as determined by the Board, and not on the basis of whether a reasonable argument could be made in favor of the adoption of some other standard. See *Propoco, Inc., supra.*

[8] 237 NLRB 881 (1978), enforcement denied 612 F.2d 728 (3d Cir. 1979).

unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of . . . the right . . . to form, join or assist labor organizations . . . ."[9] Thus, it is clear that the discriminatory punishment of union officers which we proscribed in *Precision Castings* and *Gould*, and which we have continued to proscribe since, is the sort of discrimination that runs a direct collision course with the purposes and policies of the Act, as articulated in *this* context by the express wording of the Act itself.

Our dissenting colleagues do not seriously contend that Respondent's treatment of Union Officers Blair and Riggs in this case was not discriminatory. They simply contend that such discrimination is lawful. We cannot agree.

Chairman Van de Water's view is that:

> [A]n employer may lawfully impose harsher discipline upon shop stewards *who merely participate* in an unauthorized work stoppage than it imposes upon other employees who also participate . . . . In light of the greater responsibility and authority which reside in the position of shop steward, a steward's misconduct is obviously more serious than that of the rank and file . . . therefore . . . an employer such as Respondent may impose more severe discipline upon shop stewards who either "instigate *or participate*" in an unauthorized work stoppage. [Emphasis supplied.]

But the Chairman's seeming enthusiasm for legitimizing such discrimination based on union status directly conflicts with his asserted agreement with the principle that "discipline based upon the mere fact that an employee holds union office is violative" of the Act. Chairman Van de Water struggles to escape the implications of adhering to two such contrary theories. He employs the simple, handy, yet ultimately transparent expedient of postulating as settled facts what are actually only general notions and suppositions[10]—not surprisingly unsupported by any record evidence in this case—about the nature and essence of local union office. All of this conjecturing serves as the springboard for a grand pronouncement that "*[B]y virtue of the position* and responsibilities of shop stewards, they are *generally considered* the leaders of any unauthorized work stoppage in which they participate." (Emphasis supplied.) Thus, the Chairman adopts a *per se* approach, presumably applicable to all factual settings, holding that if a shop steward *participated* in an unauthorized work stoppage, he therefore *led* it. Indeed, he promulgates, as an axiom of the workplace, that "Shop stewards are the natural leaders of any work stoppage in which they participate." In effect, the Chairman attempts to take administrative notice of this proposition. He recognizes, of course, that his key proposition is not subject to such notice, and therefore attempts to support it with his personal preconceived notions.[11]

In order to buttress this bit of dogma—which is really the keystone to his theory of legitimate disparate treatment of union officers who merely *participate* along with rank-and-file employees in unauthorized work stoppages—Chairman Van de Water declares it to be "impossible" to differentiate between instigation of, and mere participation in, an unauthorized work stoppage. But the arbitrator to whom the Chairman would so enthusiastically defer in this case hardly found it "impossible" to differentiate, as he explicitly did, between Zemonick's *instigation* of the instant unauthorized work stoppage, and Blair's and Riggs' mere participation in it. Indeed, the Chairman himself relies on the distinction between instigation and participation in his attempt to distinguish the instant case from *Precision Castings, supra*; in his view, "both Blair and Riggs were *instigators and participants* in the strike and, therefore, their conduct is distinguishable from that in *Precision Castings*." (Emphasis supplied.) What, exactly, the stewards in that case did to demonstrate that their participation in an unlawful work stoppage did not constitute instigation, the Chairman does not indicate.

Clearly—and regrettably—Chairman Van de Water has drained all significance from his espousal of the proposition he purports to affirm in his statement that "discipline based upon the mere fact that an employee holds union office is violative of Section 8(a)(3) and (1)." For he would find that union officers who *do* no more than their rank-and-file fellow employees in the course of their mutual participation in an unauthorized work stoppage, but who are nevertheless more severely disciplined than the rank-and-file employees, are not treated disparately because they are union officers. Rather, according to our colleague, because they are union officers they are *per se* instigators of the strike, and not mere participants in it. The inescapable conclusion of the Chairman's reasoning is that union offi-

[9] Secs. 7 and 8(a)(1) of the Act.

[10] Most of these echo similar such statements made by former Member Penello in his concurring opinion in *Midwest Precision Castings Company*, 244 NLRB 597, 600–601 (1979).

[11] The Chairman points to not a shred of record evidence to support this novel postulate. Rather, he relies on a concurring statement by Justice Powell in *Complete Auto Transit, Inc.* v. *Reis*, 451 U.S. 401 (1981), and a single 35-year-old district court decision. Neither of these authorities involves interpretation of the National Labor Relations Act. They provide no base for the house of cards he has built. For that authority suggests only that an official may indicate by actions what he does not state in words. It is a far cry from there to the broad proposition the Chairman sets out.

cers are properly singled out not for what they *do*, but merely for what they *are*. That, to us, is the essence of discrimination, and that, to us, is repugnant.[12]

Unlike Chairman Van de Water, who finds that union office carries with it an inherent higher obligation on union officers than on rank-and-file employees to avoid participation in unauthorized work stoppages, Member Hunter purports to find such an obligation to be inherent in a no-strike clause.

In first attempting to avoid the obvious discriminatory implications of different treatment of union officers and rank-and-file employees for the same offense (participation in an unauthorized strike), Member Hunter seems to say that more severe treatment of union officers under such circumstances is not *inherently* destructive of the right of an individual to support and assist a union by becoming an officer of that union. Instead, in Member Hunter's view, the imposition of such disparately severe treatment on union officers who act no more improperly than rank-and-file employees has no more than a comparatively slight adverse effect on an individual's right to support and assist a union by becoming an officer of that union. Thus, under the analytical framework set forth in *N.L.R.B.* v. *Great Dane Trailers, Inc.*,[13] Member Hunter suggests that an employer who wishes to impose disparate punishment on union officers need only avoid the outer trappings of union animus in doing so.

We disagree with Member Hunter's underlying premise that treating union officers more severely than rank-and-file employees, for no other reason than the fact that the former hold union office, is not inherently destructive of individual rights in regard to union support and assistance. As we commented above, punishment received for *being* something (a union officer) rather than for *doing* something (participating in an unauthorized work stoppage) is the *essence* of discrimination; *discrimination* is *inherent* in such treatment. No amount of union animus can make such treatment *more* discriminatory, and a total absence of union animus cannot make it less so.

Nor do we find, as Member Hunter seems to find, that an employer's right under a no-strike clause to be free from unauthorized work stoppages legitimizes, by counterbalancing, the inherently discriminatory effects of singling out union officers for especially harsh treatment, where such treatment is totally unwarranted by the union officers' actions.[14]

The linchpin for Member Hunter's balancing theory is his bald assertion that:

> [B]y far the most immediate and therefore effective way to prevent such illicit strikes is in the employer's right to enforce the contracts' strike prohibition by disciplining or discharging "the steward or some other union official close to the scene who has the power, authority and influence most effectively to quash an illegal strike during its infancy or to prolong it indefinitely."[15]

Notwithstanding Member Hunter's discovery of by far the most effective way to prevent strikes, we seriously doubt, first of all, whether punishing only union officers for their participation in an unauthorized strike will have much of an impedimental effect on the *unpunished* rank-and-file employees' willingness to engage in further unauthorized work stoppages when they feel that such action is warranted. Indeed, the only truly predictable result of punishing only union officers in such situations is that employees will be discouraged from seeking or

[12] Chairman Van de Water's alternative position in the instant case—that Blair and Riggs properly were singled out for punishment because they actually *instigated* the work stoppage—is as untenable as his primary position. We agree, of course, that union officials who instigate illegal work stoppages may be singled out for discipline. See *Midwest Precision Castings, supra*. But a finding that Blair and Riggs actually instigated the work stoppage flies full in the face of the directly opposite finding by the arbitrator to whom the Chairman is otherwise so willing to defer. More importantly, such a finding is totally unsupported by the facts. Indeed, the Chairman's assertion that Blair and Riggs instigated the work stoppage ultimately is premised not on any actual words spoken or actions taken by these two union officers, but rather on his notion that a union officer who merely *participates* in an unauthorized work stoppage nevertheless *in effect instigates* it.

We reject the view that Blair and Riggs instigated the instant work stoppage by mere participation. In the absence of any record evidence that Blair or Riggs *did* anything to instigate or prolong the work stoppage, we find that they did not.

[13] 388 U.S. 26 (1967).

[14] In this context, Member Hunter's attempt to analogize the unlawful imposition of more severe punishment on union officers to the lawful grant of superseniority to union stewards, for layoff and recall purposes, under the theory of *Dairylea Cooperative, Inc.*, 219 NLRB 656 (1975), misses the mark completely. In *Dairylea* situations, the superseniority for layoff and recall granted to union stewards, while conferring on them a special benefit, ultimately inures to the benefit of all employees and the employer, by providing for continuity and stability in the administration of a collective-bargaining agreement in the workplace.

In *Precision Castings* situations, on the other hand, the especially harsh treatment meted out to union stewards does not advance one inch an employer's right to be free from unauthorized work stoppages. Thus, under *Dairylea*, the incidental detriment resulting from a special benefit for union stewards is necessary to the *achievement* of overall stability in the workplace. But under *Precision Castings* the fundamental detriment resulting from a special punishment for union officers is unproductive in *preventing* the overall instability in the workplace brought on by the unauthorized strike in which such union officers played no special role.

[15] Member Hunter's reliance on the Third Circuit Court of Appeals opinion in *Gould, Inc.* v. *N.L.R.B.*, 612 F.2d 728 (3d Cir. 1979), as support for his view of what is "by far the most effective way to prevent strikes" is both misplaced and misleading. In *Gould*, unlike the instant case, the union official was under an express contractual obligation to take affirmative steps to end unauthorized work stoppages, and the court's discussion relied upon by Member Hunter was in the context of discipline imposed based on breach of that contractual obligation.

accepting union office—precisely the unlawful effect which we attempt to foreclose in this case, and which we have attempted to foreclose since our decision in *Precision Castings.*[16]

Secondly, no matter *how* effective such blatant discrimination against union officers *might* be in discouraging rank-and-file employees from engaging in future unauthorized work stoppages—and, as seen, we seriously doubt such efficacy—the fundamental *statutory* right of employees to support and assist labor organizations by becoming union officers cannot be sacrificed to a contractual right of employers to be free from unauthorized work stoppages. For that reason, the numerous arbitration decisions which Member Hunter relies upon are unpersuasive. While each of those decisions discusses and analyzes contractual rights and obligations, expressed and implied, none of those decisions contains any discussion of the effect of disparate treatment of union officers on the rights of employees under the Act to assist unions by becoming union officers.[17]

Thus, we cannot subscribe to Member Hunter's view that there is, inherent in a no-strike clause, a special, higher obligation on union officers than on rank-and-file employees to avoid participation in an unauthorized work stoppage, which alone legitimizes more severe punishment of such union officers.

Our concurring colleague finds the presence or absence of express contractual obligations on union officers (i.e., requiring them to take affirmative steps to prevent or curtail unauthorized work stoppages) to be significant in assessing the propriety of disparate treatment of union officers (*vis-a-vis* rank-and-file employees) who do no more than merely participate in such work stoppages.

We disagree with our concurring colleague in this regard. We find disparate treatment of union officers *on the basis* of their union office to be patently discriminatory under the Act, whether or not such disparate treatment is said to be meted out in consequence of an alleged breach of a contractual duty.[18] In *Gould Corp., supra*, union officers were contractually required to "use every reasonable effort to terminate" unauthorized work stoppages. We found that a union steward who neither instigated nor led such a work stoppage was unlawfully singled out for more severe punishment than his rank-and-file co-participants in the work stoppage:

> [N]ot because of his actions as an employee, but because of his lack of actions as a steward, a legally impermissible criterion for discipline under the Act, and one which is not validated by a contract clause that specifies the responsi-

[16] That exact result followed from the employer's attempts to mete out harsher discipline to stewards who did nothing more than participate in an illegal work stoppage in *Miller Brewing Company*, 254 NLRB 266 (1981), enfd. *sub nom. Szewczuga* v. *N.L.R.B.*, 110 LRRM 3289. We also note that in *Szewczuga* the District of Columbia Circuit Court, *inter alia*, expressly rejected the proposition that union officers are subject to a higher standard of conduct *by virtue* of their office.

[17] Indeed, a careful examination of these arbitral decisions discloses that they do not, as Member Hunter suggests, "recognize[,] almost without exception that stewards . . . have a higher duty to abide by and enforce a no-strike obligation than rank and file employees."

Thus, in *Koehring Co.*, 69 LA 459 (1977) (Boals, Arb.), and *Abex Corp.*, 68 LA 805 (1977) (Richman, Arb.), arbitrators actually set aside punishments of union officers who did no more than participate, along with unpunished or less severely punished rank-and-file employees, in unauthorized work stoppages. The only punishments which the arbitrator upheld in *Abex* were those imposed on the union president and two other union officers who the arbitrator determined had taken actual, overt leadership or protagonist roles in the unauthorized work stoppage.

In *ITT Abrasive Products Co.*, 58 LA 595 (1972) (Geissinger, Arb.), and *General Fireproofing Co.*, 56 LA 1118 (1971) (Williams, Arb.), arbitrators upheld more severe treatment of union officers who participated in unauthorized work stoppages because, in the face of express contractual obligations requiring the unions affirmatively to attempt to terminate unauthorized work stoppages, the disparately treated union officers failed to take sufficient affirmative measures to terminate the unauthorized work stoppages.

In *Powermatic/Houdaille, Inc.*, 65 LA 1245 (1976) (Byars, Arb.), the arbitrator set aside the disparate treatment of a union officer who did no more than participate in an unauthorized work stoppage on the grounds that the employer's selection of that officer for discipline was arbitrary under the circumstances.

In *Stokely-Van Camp, Inc.*, 60 LA 109 (1973) (Karasick, Arb.), the arbitrator did uphold disparate treatment of union officers who did no more than participate in an unauthorized work stoppage. But the union there conceded before the arbitrator that "Union officers and committeemen have responsibilities in a strike situation which are greater than those of ordinary Union Members," and the arbitrator expressly relied on that concession in reaching his decision.

In *Acme Boot Co.*, 52 LA 585 (1969) (Oppenheim, Arb.), the arbitrator upheld the discharge of a union officer for participating in an unauthorized work stoppage where the union officer was not treated more severely than rank-and-file employees who participated to the same extent he did.

Finally, in *Sealright Co., Inc.*, 53 LA 154 (1969) (Belcher, Arb.), the more severe treatment meted out to the union president in that case was found to be justified on the grounds that he advised rank-and-file employees who were due to commence work on their shift during an unauthorized work stoppage that *he* was "not about to cross the picket line." Thus, *Sealright* brings us full circle to the instant case. Here, Union President Zemonick was more severely punished. Like the union president who was more severely punished in *Sealright*, Zemonick made his *leadership* of the unauthorized work stoppage clear to rank-and-file employees, and he was, quite properly, more severely punished as a result.

[18] Member Fanning finds it unnecessary to decide in this case whether a union can, by contract, waive the individual Sec. 7 right of an employee to assist a union by means of a provision which allows for the discipline of union agents who fail to take affirmative steps to end a contract-violative work stoppage. The contract involved herein does not place any affirmative obligations upon union agents in regard to such work stoppages. Therefore, the dicta of Member Zimmerman's concurrence notwithstanding, the issue of waiver is not present in this case.

Member Fanning also notes the stated confusion of Member Hunter as to the majority's holding as a result of the injection of the issue of waiver in this case and his speculation as to the logical import of Member Fanning's refusal to pass on the waiver issue. Nevertheless, Member Fanning sees no reason to address Member Hunter's confusion, which he finds inexplicable, or to attempt to discern its source. Member Fanning only notes that, despite what Member Hunter considers to be "logical," his refusal to decide the waiver issue represents nothing more than his reluctance to pass on an issue not involved in this case.

bilities of union officers while acting as union officers.[19]

We continue to adhere to this position.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Consolidation Coal Company, Four States, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its records and files any and all references to the unlawful suspensions and discharges of employees Willard Blair, Jr., and Gary L. Riggs, and notify them, in writing, that this has been done and that evidence of these unlawful suspensions and discharges will not be used as a basis for future personnel actions against them."

2. Substitute the attached notice for that of the Administrative Law Judge.

MEMBER ZIMMERMAN, concurring:

I agree with my colleagues in the majority that Respondent violated Section 8(a)(3) and (1) of the Act, when it singled out Union Officers Blair and Riggs for punishment for engaging in an unauthorized work stoppage in which Respondent's entire 70-employee day shift participated. I also agree with my colleagues' rejection of Chairman Van de Water's contention that there is, inherent in the position of union officer, a higher obligation on union officers to refrain from participating in an unauthorized work stoppage, and with their rejection of Member Hunter's contention that such an obligation is inherent in an express or, as here, implied no-strike clause. I specifically join in so much of the majority decision as responds to these contentions of our dissenting colleagues.

Unlike my colleagues in the majority, however, in concluding that Respondent violated the Act by disparately treating Union Officers Blair and Riggs, I find it significant, and I rely on the fact, that the collective-bargaining agreement between Respondent and the Union contains no express provision which requires union officers to take affirmative steps to prevent or curtail unauthorized work stoppages,[20] and on the fact that neither Blair nor Riggs instigated the work stoppage.[21]

Fundamentally, I do not dispute—indeed, I subscribe to—the real value of no-strike clauses in providing for stability in the workplace. So, too, do I recognize the potentially valuable role of union officers in preventing or curtailing unauthorized work stoppages in violation of such no-strike clauses. Therefore, I acknowledge the propriety of imposing obligations on union officers to take affirmative steps to prevent or curtail unauthorized work stoppages. And, finally, I concede that, *as an appropriate adjunct to such special obligations* on union officers, employers may accord special treatment to those union officers who do not meet their special obligations.

The source of my disagreement with Chairman Van de Water and Member Hunter is that such special obligations on union officers to take affirmative steps to prevent or curtail unauthorized work stoppages must be made explicit in the collective-bargaining agreement itself. Quite simply, obligations of this magnitude, which carry with them not only the principal responsibility for maintaining stability in the workplace, but also the very real risk of discipline at the hands of the employer and intense resentment on the part of rank-and-file fellow employees, cannot be thrust upon union officers without clear notice to them of such special obligations attendant to their union position. No such notice of obligation and attendant risk is provided by my dissenting colleagues' willingness to find that such crucial and burdensome obligations are *inherent* in a no-strike clause, or are *inherent* in the position of union officer itself.

Thus, I adopt the view of the Third Circuit Court of Appeals, as set forth in *Metropolitan Edison Company* v. *N.L.R.B.*, *supra*. There, the court ruled that:

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[19] 237 NLRB at 881. In *Armour-Dial, Inc.*, 245 NLRB 959 (1979), we noted as fact the lack of contractual obligations on union officers who do not participate in unlawful work stoppages. We specifically noted that we were not addressing the issue of whether a union could contractually waive employee rights based on retention of union office. 245 NLRB at 960, fn. 8.

[20] Compare, e.g., *Gould, Inc.* v. *N.L.R.B.*, 612 F.2d 728 (3d Cir. 1979), denying enforcement of 237 NLRB 881 (1978) (contractual obligation on union officers to terminate work stoppages; disparate punishment not violative), with *Metropolitan Edison Co.* v. *N.L.R.B.*, 663 F.2d 478 (3d Cir. 1981), enfg. 252 NLRB 1030 (1980), cert. granted 102 S.Ct. 2926 (June 14, 1982) (no contractual obligation; disparate punishment violative), and *Hammermill Paper Co.* v. *N.L.R.B.*, 658 F.2d 155 (3d Cir. 1981), enfg. 252 NLRB 1236 (1980) (no contractual obligation; disparate punishment violative). See also *C. H. Heist Corp.* v. *N.L.R.B.*, 657 F.2d 178 (7th Cir. 1981), enfg. 250 NLRB 1400 (1980) (no contractual obligation, and extensive actual efforts to curtail; disparate treatment violative); *Szewczuga* v. *N.L.R.B.*, 110 LRRM 3289 (D.C. Cir. 1982), enfg. *Miller Brewing Co.*, 254 NLRB 266 (1981).

[21] Employees—be they union officers or not—who *instigate* unauthorized work stoppages are quite properly subject to more severe treatment at the hands of their employers than are employees who only participate in such activity. *Midwest Precision Castings Company*, 244 NLRB 597 (1979). See also *Armour-Dial, Inc.*, 245 NLRB 959 (1979) (as to union president). Indeed, in the instant case, the discharge of Charging Party Zemonick for instigating and leading the unauthorized work stoppage was not even *alleged* to be unlawful.

> An employer may impose greater discipline on union officials if the collective bargaining agreement enumerates specific affirmative steps a union official is to take in the event of an illegal work stoppage and the official has failed to perform those actions.
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> * * * * *
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> If the collective bargaining agreement requires in general terms that union officials take affirmative steps to end an illegal work stoppage, a union official does not breach that duty simply because he does not take the exact affirmative steps the employer ordered him to take. Only if his actions in complying with that duty are not in good faith does he become subject to greater discipline.
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> * * * * *
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> If the collective bargaining agreement does not specify that union officials have some responsibility to try to end an illegal work stoppage, then the company may not impose any greater discipline on union officials than on other participants in the strike.[22]

Express contractual provisions which impose obligations on union officers to take affirmative steps to prevent or end unauthorized work stoppages do in fact place higher responsibilities on such union officers than on their rank-and-file fellow employees. The parties to the contract have, obviously, *agreed* to the imposition of such higher responsibilities. The union officers themselves have either actual or constructive knowledge of their higher responsibilities as expressed in the contract.[23] A failure on the part of union officers to take contractually mandated steps to prevent or end unauthorized work stoppages is an act of which *only* union officers, and not rank-and-file employees, can be guilty. Therefore, where a collective-bargaining agreement contains such express provisions, union officers who participate in unauthorized work stoppages are perforce in violation not only of the contractual no-strike clause, but also of the contractual provisions requiring them to take affirmative steps to prevent or curtail unauthorized work stoppages. Under those circumstances, when a union officer who fails to take such contractually mandated steps is ultimately punished more severely than his rank-and-file fellow employees for merely *participating* in an unauthorized work stoppage, that union officer cannot be said to have been singled out by the *employer* for more severe punishment. Instead, in a very real sense, that union officer has already been singled out by his *union* for greater responsibility as one to whom the employer may legitimately look, under the express terms of the collective-bargaining agreement, for assistance in preventing or ending unauthorized work stoppages.[24]

To reiterate, if a collective-bargaining agreement contains an express provision which requires union officers to take affirmative steps to prevent or curtail unauthorized work stoppages, then I would find that more severe punishment imposed on union officers who do no more than participate in such an authorized work stoppage is not violative of the Act. But, in the absence of any such express contractual obligations or evidence of instigation, I would not, contrary to my dissenting colleagues and the arbitrator to whom they would defer, premise a finding of validly imposed disparate treatment in this case on the notion that union officers have an *inherently* greater responsibility than rank-and-file employees to refrain from engaging in an unauthorized work stoppage. I agree with my colleagues in the majority in rejecting my dissenting colleagues' positions in that regard.

CHAIRMAN VAN DE WATER, dissenting:

With due deference to the majority's view here, I would nevertheless defer to the arbitrator's decision. That decision, accomplished in accord with the parties' collective-bargaining agreement, reduced the discharges of employees Blair and Riggs, two Mine Committee members, to 30-day suspensions for their participation in an illegal work stoppage in the face of a no-strike clause. In my judgment, *Spielberg*[25] is applicable here and I would defer to the arbitrator's award and dismiss the complaint.

Even when I reach the merits of the case, I would not find their discharges violative of Section

[22] 663 F.2d at 481.

[23] To the extent such express contractual provisions could be said to imply a waiver, at least in part, on an employee's right to be free from disparate treatment on the basis of his status in a union, such a right is no less amenable to waiver than the core right to strike, routinely waived in bargaining as the *quid pro quo* for inclusion of a grievance and arbitration clause in the collective-bargaining agreement. See *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Co.*, 369 U.S. 95 (1962) (implied waiver of right to strike). And to the extent that such contractual provisions could be said to dissuade rank-and-file employees from seeking union office:

> [T]he obvious and short answer is that they should be deterred from seeking office if they intend thereafter to participate in illegal work stoppages or to repudiate contractual obligations which were *freely negotiated and voluntarily assumed.* [Emphasis supplied.] [*Gould, Inc.* v. *N.L.R.B.*, 612 F.2d at 733.]

[24] Indeed, in *Armour-Dial, Inc.*, 245 NLRB 959 (1979), enforcemnt denied 638 F.2d 51 (8th Cir. 1981), my colleagues in the majority specifically noted the absence of such affirmative obligations on union officers in finding unlawful disparate treatment when union officers who did not participate in the unauthorized work stoppage were singled out for discipline.

[25] *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

8(a)(1) and (3) because the majority relies on the Board's prior Decision in *Precision Castings Company*, 233 NLRB 183 (1977), a case I consider distinguishable and, in any event, incorrect. On the merits I would find that the discharges of Blair and Riggs were proper on two grounds. First, both Blair and Riggs were *instigators and participants* in the strike and, therefore, their conduct is distinguishable from that in *Precision Castings, supra*. Secondly, I disagree that *Precision Castings* is good precedent since I would find that absent extraordinary circumstances, a union official or steward, as a selected union leader, has an affirmative duty to see that employees live up to their contractual commitments. Official leadership of labor, as well as of management, entails both legal rights and duties that are unique to the status of official leadership. I do not, of course, foreclose the possibility of finding that, in some circumstances, the disciplining of a union steward is violative of the Act.

Union officials are quite generally respected and are looked to for leadership—by their conduct as well as by their words—by the employees they represent. Thus, what the leaders do is usually influential in determining what the employees will do. However, whenever union leaders or management leaders exceed the proper parameters of allowable actions, it is the responsibility of this Board to find such conduct unlawful or unprotected so that both management and labor will have clear boundaries to guide their future conduct.

The facts in this case are as follows. Shortly before the day shift began on February 18, 1980, the Union's Mine Committee, composed of Local Union President Mike Zemonick, Committee Chairman Willard Blair, and Committeeman Gary Riggs, met with Mine Superintendent Barry Dangerfield to resolve a dispute concerning a job assignment. They did not resolve the dispute. The meeting ended when Dangerfield ordered Zemonick to go to work and Zemonick replied that he was relieving himself and other committeemen from work to go to the union office on official union business. Meanwhile, most of the approximately 70 employees scheduled to go to work at 8 a.m. were changing into their work clothes and assembling in the lamp room.

Returning from the meeting, Zemonick, Blair, and Riggs walked through the lamp room and into the bathhouse. Most if not all of the employees followed them. Zemonick stood on a bench and told the employees that they should go to work. He also stated that the Mine Committee was relieving itself from work and was going to the Union's district office on official union business. Blair told one or two employees that they should go to work while the committee went to the union office.

Dangerfield learned that the employees were not reporting for work. He went to the bathhouse where he told Zemonick to go to work and asked him what he was doing. When Zemonick replied that he was conducting a union meeting, Dangerfield said that he could not have a union meeting that interfered with production. Zemonick then said that he had instructed the men to work. Dangerfield waved his hands in the air and, addressing all of the employees, told them that he wanted them to go to work. Dangerfield left the bathhouse but soon returned. Some of the employees were dressing into their street clothes, and Dangerfield asked Zemonick what was going on. Zemonick replied that the men were going home. Dangerfield left the bathhouse and went to his office. None of the employees went to work, except for two employees who had gone into the mine prior to the meeting in the bathhouse. Consequently, the mine shut down that day.

On the same day, Respondent notified Zemonick, Blair, and Riggs in writing that each was "suspended with intent to discharge for . . . irresponsible actions of insubordination, and instigation of an unauthorized work stoppage." No other employee was disciplined for involvement in the work stoppage.[26] The Union grieved the discipline imposed upon the three union officials, and arbitration hearings were held at the end of February.

The arbitrator found that Zemonick had instigated the work stoppage, and upheld his discharge. No complaint issued as to Zemonick's discharge, and it is not at issue in this case. With respect to Blair and Riggs, the arbitrator found that neither of them instigated the unauthorized work stoppage. He did find, however, that as union officials they had a greater responsibility than rank-and-file employees to observe the no-strike commitment in the collective-bargaining agreement. He concluded that they abrogated this responsibility by joining the strike, and were also insubordinate by refusing to obey Dangerfield's order to go to work. For several reasons, the arbitrator found that the penalty imposed by Respondent, discharge, was too severe, and he reduced the discharges to 30-day suspensions.

The Administrative Law Judge found that the arbitration decisions were repugnant to the purposes and policies of the Act, as construed by the Board's Decision in *Precision Castings Company, supra*, and thus he did not defer to them. He found

[26] At the hearing the General Counsel conceded that the work stoppage was unlawful.

that Respondent violated Section 8(a)(3) and (1) of the Act because it disciplined Blair and Riggs on the basis of their membership on the Mine Committee.

It is clear that each of the three union officials had a role in instigating the unauthorized work stoppage, with Zemonick playing a key role. As the employees were preparing for work, Zemonick rallied them by standing on a bench in the bathhouse and indicating to them that a dispute had not been resolved to the Mine Committee's satisfaction. While this alone probably would have been sufficient to trigger a work stoppage, Zemonick also said that the Mine Committee was relieving itself from work to go to the Union's district office on official union business. By thus announcing that the Mine Committee would not work, he signaled to the employees that they should not work either. It is well known that union officials frequently signal job actions by words or conduct which, to the casual observer, may appear to be quite innocuous. As Justice Powell noted in his concurring opinion on *Complete Auto Transit, Inc.* v. *Reis*, 451 U.S. 401, fn. 1 (1981), "Strike encouragement sometimes is explicit but more often is cryptic. A union may employ subtle signals to convey the message to strike." This tactic is particularly prevalent in the coal mining industry. *United States* v. *International Union, United Mine Workers of America*, 77 F.Supp. 563, 566 (D.D.C. 1948), affd. 177 F.2d 29 (D.C. Cir.), cert. denied 338 U.S. 871 (1949). ("If a nod or a wink or a code was used in place of the work 'strike,' there was just as much a strike called as if the word 'strike' had been used.") Although Zemonick did tell the employees to go to work, it would be naive to infer that he really meant this, or that the employees took this statement seriously. Zemonick's intentions became even clearer when Dangerfield appeared at the bathhouse and told him to go to work. Zemonick did not go to work, which would have been an acknowledgment of management's rightful authority to maintain production especially in light of the no-strike clause. To the contrary, he defiantly persisted in leading the incipient work stoppage by stating that he was conducting a union meeting. A short time later, when Dangerfield returned to the bathhouse, Zemonick said that the employees were going home, and he was unresponsive to Dangerfield's insistence that the employees should go to work.

As previously noted only the conduct of Blair and Riggs is in issue here. Although their conduct was perhaps not as obvious as that of Zemonick, it served as a catalyst for the work stoppage. Upon returning to the bathhouse with Zemonick, they willingly lent the prestige of their union offices to his efforts to incite a work stoppage. Their very presence as Zemonick was fomenting the walkout constituted at least tacit assent to his efforts. *N.L.R.B.* v. *Armour-Dial, Inc.*, 638 F.2d 51, 56 (8th Cir. 1981). ("The role the [union executive] committee played in inducing the work stoppage will not be overlooked even though the committee members chose to communicate their support in a non-verbal manner.") Blair's attempt to get "one of the fellow employees" to go to work appears to have been insincere or, at best, half-hearted. It should be noted that neither Blair nor Riggs made any effort to go to work,[27] but acquiesced in Zemonick's statement that the Mine Committee, which included Blair and Riggs, would not work. By so doing, they approved and joined Zemonick's position and thereby instigated and participated in the unlawful work stoppage.

Moreover, I am of the opinion that an employer may lawfully impose harsher discipline upon shop stewards who merely participate in an unauthorized work stoppage than it imposes upon other employees who also participate. This is particularly true in this case because the actions of mine committeemen in the coal industry are a signal to employees whether they should work. I view recent Board law on this issue, which was first enunciated in *Precision Castings Company, supra*, relied upon by the Administrative Law Judge, to be a particularly pernicious aberration from the Board's prior holdings in this area.[28] Recently, the Board has attempted to create a distinction between stewards who merely participate in unlawful work stoppages and those who actually instigate such stoppages. See, e.g., *Midwest Precision Castings Co.*, 244 NLRB 597 (1979). (In most instances this distinction is unrealistic and unworkable.) Shop stewards are the natural leaders of any work stoppage in which they participate. This is because they have greater re-

[27] Respondent's regional manager of industrial and employee relations, eastern region, explained the significance of this, testifying that, when mine committeemen refuse to obey a management work order in front of rank-and-file miners, those employees will not work.

[28] See, e.g., *Chrysler Corporation, Dodge Truck Plant*, 232 NLRB 466, 474 (1977) ("[e]ither type of activity—mere participation or active leadership—is in and of itself sufficient grounds for removal"); *Super Valu Xenia*, 228 NLRB 1254 (1977); *Russell Packing Co.*, 133 NLRB 194 (1961).

I note that several circuit courts have considered this issue. In most recent cases, the courts have carefully examined the collective-bargaining agreements to determine exactly what responsibilities, if any, were contractually imposed upon the steward. *Metropolitan Edison Company* v. *N.L.R.B.*, 663 F.2d 478, 481 (3d Cir. 1981). ("An employer may impose greater discipline on union officials if the collective bargaining agreement enumerates specific affirmative steps a union official is to take in the event of an illegal work stoppage and the official has failed to perform those actions.") *C. H. Heist Corporation* v. *N.L.R.B.*, 657 F.2d 178 (7th Cir. 1981). I maintain, however, that in the world of reality, the position of shop steward carries with it responsibilities so vital that the provisions which the courts would require are redundant.

sponsibilities and duties than other employees, particularly with respect to the union's no-strike commitment. Consequently, an employer is entitled to expect that a shop steward will act in accordance with this responsibility and may discipline a steward who does not.

"Shop Stewards or committeemen are employees' immediate contact with their statutory representative, and for many purposes the shop steward or committeeman *is* the union *vis-a-vis* the employees . . . both within or without a collective-bargaining agreement." *General Motors Corporation*, 218 NLRB 472, 477 (1975), enfd. in unpublished opinion 535 F.2d 1246 (3d Cir. 1976). Employees, therefore, quite naturally look to stewards for guidance regarding work-related problems. By the very nature of their positions, stewards acquire significant authority over rank-and-file employees. They become knowledgeable about the provisions of the collective-bargaining agreement, so employees with questions concerning the interpretation of the contract seek the assistance and make judgments based on the conduct of a steward. Collective-bargaining agreements typically require or make available the opportunities to an employee with a grievance to take it to the steward.[29] Also, an employee who believes that he may be disciplined very often turns to a steward for help.[30] Employees similarly look to shop stewards for leadership in a crisis situation such as a brewing work stoppage. The rank and file take their cue from what their stewards are or are not doing.

In the instant case, Respondent's regional director manager of industrial and employee relations, eastern region, confirmed this commonsense appraisal. He testified that when mine committeemen dress into their street clothes and leave the bathhouse, other employees do likewise. He also testified, as noted previously, that when mine committeemen refuse to obey a management work order in front of rank-and-file miners, the men will not work. Therefore, by virtue of the position and responsibilities of shop stewards, they are generally considered the leaders of any unauthorized work stoppage in which they participate.

The artificiality of the distinction between instigation of a work stoppage and participation in one is also well illustrated by *Gould Corporation*, 237 NLRB 881 (1978), enforcement denied 612 F.2d 728 (3d Cir. 1979), cert. denied 449 U.S. 890 (1980). In that case, approximately 50 employees walked off the job in violation of a no-strike clause. In response to a supervisor's efforts to get the employees back to work, a shop steward who had joined the walkout announced that "we aren't going back to work." The respondent in that case discharged the steward, but no other employee, for violating the no-strike clause of the collective-bargaining agreement. A majority of the Board found that respondent violated Section 8(a)(3) by disciplining the steward for participating in the unauthorized work stoppage. Member Truesdale dissented on this point, finding that the steward actively encouraged the continuation of the work stoppage. Member Penello dissented on the basis that the steward "was the natural leader of the work stoppage."[31] While I am in complete agreement with Member Penello's characterization of the situation in *Gould*, I think that the case is especially important because it illustrates the impossibility of pigeonholing the type of conduct at issue as either "instigation" or "participation."

In light of the greater responsibility and authority which reside in the position of shop steward, a steward's misconduct is obviously more serious than that of the rank and file. Seldom is misconduct more egregious than breaching a no-strike commitment. It seems clear to me, therefore, that an employer such as Respondent may impose more severe discipline upon shop stewards who either "instigate or participate" in an unauthorized work stoppage. Such discipline is lawful as long as it is based upon the stewards' acts while holding union office. On the other hand, I agree that discipline based upon the mere fact that an employee holds union office is violative of Section 8(a)(3) and (1).[32] The Administrative Law Judge in the instant case was incorrect in concluding that Respondent discharged Blair and Riggs simply because of their membership on the Mine Committee and thereby violated Section 8(a)(3) and (1).

The majority opinion is studded with inconsistencies, misstates my position, and is fatally flawed because it is bottomed on a factual situation which is nonexistent. The inconsistencies include the criticism of my opinion rejecting the conclusion of the arbitrator that the mine committeemen did not instigate the strike while they in turn reject the arbitrator's conclusion that the mine committeemen could be properly disciplined by a 30-day suspension for their part in the unlawful strike. A further inconsistency is that, while rejecting the arbitrator's conclusion and remedy in this case, they cite a number of arbitrators' decision at footnote 17 of their decision that support their view. In practice,

[29] Art. XXIII of the contract in the instant case, for example, provides that "[t]he duties of the Mine Committee shall be confined to the adjustment of disputes arising out of this Agreement that the mine management and the Employee or Employees fail to adjust."

[30] *N.L.R.B. v. Weingarten, Inc.*, 416 U.S. 969 (1974).

[31] See also *Midwest Precision Castings Co., supra* at 601.

[32] *General Motors Corp., supra* at 477 (union office "embodies the essence of protected concerted activities").

the majority has consistently rejected arbitrators' decisions whenever they have disagreed with the result.

I vigorously dispute the majority's view that I do not seriously contend that the treatment of Mine Committeemen Blair and Riggs "was not discriminatory," or that I simply contend that "such discrimination is lawful." In fact, what would be discriminatory treatment is to permit Blair and Riggs to escape discipline for conduct similar to that for which Union President Zemonick was discharged. Rather, it is the majority here which validates disparate treatment which is the very basis of most discriminatory findings.

Thus, in essence, the majority's opinion is largely dicta, stating a position on facts that do not exist in this case. Everyone agrees that if a union official is disciplined "solely" because he is a union official such conduct is discriminatory and unlawful under our Act. However, the inescapable fact here is that the refusal of three mine committeemen to work is what prompted the unlawful walkout by the rest of the shift. Thus, it was the mine committeemen's status as officials of the Union *and their refusal to work* that prompted the illegal walkout and the discipline that followed. The majority's refusal to accept those undisputed facts reduces their opinion to a prime illustration of creative rhetoric and is mere dicta. I cannot conceive of any court in this land that would not defer to the arbitrator's decision in this case and foreclose this rehash of the same issue in yet another forum.

Finally, I am constrained to point out that the majority's position undermines one of the most important policies embedded in Federal labor law. The grievance-arbitration process and its companion no-strike commitment are the keystone of our national policy of ensuring stable industrial relations.[33] As a practical matter, an employer who is victimized by an unauthorized work stoppage in violation of a no-strike commitment has only one effective recourse: disciplining the participants.[34] My colleagues deny this prerogative to an employer precisely where it is most effective. This is not logical. Accordingly, I would dismiss the complaint in its entirety.

MEMBER HUNTER, dissenting:

Contrary to my colleagues in the majority,[35] I would defer to the arbitrator's awards.[36] The facts are fully set forth by my colleagues and I will not recount them here. I note, however, that, in considering Respondent's allegedly unlawful discipline of the union committeemen, the arbitrator found that the role of the committeemen in the illicit strike was not comparable to that of the other employees, because as union officers they had greater responsibility for observance of the Union's no-strike obligation. The arbitrator further found that the committeemen had abrogated this responsibility by disobeying the employer's back-to-work order and then joining the walkout and, in so doing, lent the credibility of their office to the illicit action. The arbitrator concluded that the harsher discipline of the two union committeemen was thus warranted by their breach of their duty inherent in the collective-bargaining agreement. As set forth in my dissent in *Professional Porter & Window Cleaning Co., Division of Propoco, Inc.*, 263 NLRB No. 34 (1982), I find that an arbitrator has adequately considered the unfair labor practice issues when the contractual and statutory issues are factually parallel and the arbitrator is presented with the facts relevant to the unfair labor practice. That is clearly the situation here.[37] The contractual issue decided

[33] *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[34] *Sinclair Oil Corporation* v. *Oil, Chemical and Atomic Workers International Union*, 452 F.2d 49, 54 (7th Cir. 1971). Recently, in *Complete Auto Transit, Inc.* v. *Reis*, 451 U.S. 401, fn. 18 (1981), the Supreme Court listed a "significant array" of remedies which it claims are available to an employer who seeks to deter wildcat strikes. Two of these remedies, injunctive relief and money damages, are seemingly available only against a union as an entity, and thus would not be available where, as here, the work stoppage is not authorized by the Union. The court also suggested that a union might itself discipline its members who are engaging in an unauthorized work stoppage. I think that it is unfair and unrealistic to relegate an employer to this "remedy" and, at any rate, this would be useless in the instant case. The court also specifically noted that "an employer may discharge or otherwise discipline an employee who unlawfully walks off the job." This seems to be the only realistic alternative to me, and it is certainly the most effective one for an employer who is interested in resuming or maintaining production.

[35] The composition of the majority is unclear. Member Fanning declines to decide whether a union can, by contract, allow union agents to be disciplined for failure to take affirmative steps to end a contract-violative work stoppage. Member Zimmerman's position is that a union can do this. It appears, therefore, that only Member Jenkins, in effect, would find that disparate discipline of union officers in such a case is *per se* a violation of the Act. Moreover, if Member Fanning feels that such an issue exists, logically he would appear to reject Member Jenkins' position that disparate punishment of union officers is based solely on retention of union offices.

[36] See, generally, *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

[37] For the reasons set forth in my dissent in *Propoco, supra*, I do not require an arbitrator to pass *explicitly* on the unfair labor practice allegation. In my view, an arbitrator has adequately considered the unfair labor practice allegation if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) it appears from the record that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. Differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination of whether an award is "clearly repugnant" to the Act. I find that here the arbitrator rendered a reasonable decision on the facts at issue which is not "clearly repugnant," and the majority's refusal to defer to that award here because of the arbitrator's failure to use statutory language merely masks the majority's implicit aversion to honoring the commitment made in *Spielberg Manufacturing Company, supra*. For the reasons set forth, *supra*, I find that differences in the standards of review are not sufficient to invalidate the award. Further, the majority's

Continued

by the arbitrator was whether the collective-bargaining agreement required a higher duty of union officers than of employees to honor and to enforce the agreement's no-strike obligation, and, if so, whether the employer correctly disciplined the union officers for breach of that duty. That is essentially the unfair labor practice allegation made here by the General Counsel, the only difference being that the same factual issue is presented in terms of Section 8(a)(3) of the Act; i.e., whether the employer's discipline of the union officers, but not rank-and-file employees, unlawfully or unjustifiably discouraged the union officers' rights to engage in Section 7 activity. Therefore, it is clear that the arbitrator considered the issue alleged in the unfair labor practice proceeding.[38]

Further, I find deferral appropriate because I do not view the arbitrator's award as clearly repugnant to the purposes and policies of the Act. Prior to the Board's Decisions in *Precision Castings Company*[39] and *Gould Corporation*[40] the Board had found that union stewards had a greater duty than rank-and-file employees to uphold the provisions of a collective-bargaining agreement, including a no-strike clause.[41] With *Precision Castings* and *Gould*, the Board took a different tack finding, in effect, that regardless of contractual language which arguably imposed a greater duty on stewards, the Board would not find that stewards had a higher duty to enforce and comply with a no-strike clause, and accordingly the Board would find a violation of Section 8(a)(3) when an employer imposed greater discipline on stewards than on rank-and-file employees for the same conduct in breach of a no-strike clause. The Third Circuit declined to enforce *Gould*[42] itself, and further clarified the *Gould* decision in *Metropolitan Edison Company*.[43] Other circuits have addressed the issue with varying results.[44] No court thus far has agreed with the virtually *per se* rule suggested by the Board in *Gould* and *Precision Castings*.[45] In light of this decisional history, one can hardly characterize the arbitrator's award here as "clearly repugnant" to the Act.[46]

The Board's failure to honor the *Spielberg* doctrine in this case, however, compels me to address the fundamental issue of national labor policy presented here. I would defer to the arbitrator's award in any event because in my view there is no violation of the Act in an employer's discipline of stewards for breach of a no-strike clause. Thus, I agree with the arbitrator's conclusion here that the two mine committee members had a higher duty than rank-and-file employees to abide by the no-strike obligation in the collective-bargaining agreement, and accordingly could receive greater discipline than other employees for participating in the illegal strike. I find such a duty inherent in the contractual no-strike obligation itself.

Section 8(a)(3) of the Act prohibits discrimination by an employer respecting tenure or other conditions of employment with the purpose of discouraging or encouraging union membership. In this regard, in *N.L.R.B.* v. *Great Dane Trailers*,

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reliance on *Propoco* is inappropriate here. In the latter case, the majority ostensibly refused to defer because the arbitrator failed to consider whether the employer had seized upon the employees' conduct as a pretext to mask an unlawful intent to retaliate against the employees' exercise of Sec. 7 rights. In the instant case, there is no dispute that the employer selectively punished the stewards for participating in an illegal strike, and that the arbitrator expressly considered and decided whether the employer rightfully did so.

[38] In its haste to assert that I mischaracterize the issues decided by the arbitrator and now the Board, the majority asserts that "the issue . . . is whether Respondent discharged Blair and Riggs because they engaged in protected concerted activities." This typifies the *ipse dixit* approach of the majority, since it applies to all 8(a)(3) cases. Properly stated, the issue here is whether Respondent violated Sec. 8(a)(3) by disciplining union officers, but not rank-and-file employees, for engaging in an illegal strike in contravention of a contractual no-strike clause. The arbitrator explicitly addressed this issue in nonstatutory language, and found in accord with longstanding plant practice and general arbitral precedent that union officers have a higher duty to comply with a contractual no-strike obligation. The majority's assertion, that the arbitrator's decision rested only on obligations inherent in union office, disregards the obvious fact that, but for the contractual prohibition against strikes or work stoppages, the officers' participation in the strike could not have breached the contract.

[39] 233 NLRB 183 (1977).

[40] 237 NLRB 881 (1978).

[41] *Riviera Manufacturing Co.*, 167 NLRB 772 (1967); *University Overland Express, Inc.*, 129 NLRB 82 (1960); and *Stockham Pipe Fittings Company*, 84 NLRB 629 (1949). But see *Pontiac Motors Division, General Motors Corporation*, 132 NLRB 413 (1961).

[42] 612 F.2d 728 (3d Cir. 1979).

[43] *Metropolitan Edison Co.* v. *N.L.R.B.*, 663 F.2d 478 (3d Cir. 1981), enfg. 252 NLRB 1030 (1980). The Supreme Court recently granted certiorari in *Metropolitan Edison Company* at 102 S. Ct. 2926 (June 14, 1982).

[44] See, e.g., *C. H. Heist Corp.* v. *N.L.R.B.*, 657 F.2d 178 (7th Cir. 1981); *N.L.R.B.* v. *Armour-Dial, Inc.*, 638 F.2d 51 (8th Cir. 1981), and *Fournelle* v. *N.L.R.B.*, 670 F.2d 331 (D.C. Cir. 1982).

[45] I would overrule *Precision Castings* and *Gould*. Although Member Zimmerman's concurring opinion might be read as inconsistent with the holdings in *Precision Castings* and *Gould*, he does not state that he would overrule those cases.

[46] The harm to the collective-bargaining process posed by my colleagues' refusal to defer here was particularly apparent in the Board's Decision in *Bethlehem Steel Corporation*, 252 NLRB 982 (1980), enforcement denied *sub nom. Fournelle* v. *N.L.R.B.*, *supra*. There, a permanent umpire in an earlier arbitration award had found that inherent in the collective-bargaining agreement's no-strike obligation was a right on the part of the employer to punish union officials more severely than rank-and-file employees for violation of the no-strike clause. As the circuit noted in declining to enforce the Board's Order, neither of the parties to the agreement challenged the umpire's award in assessing the union official's rights and obligations. The instant case is an even stronger one since the arbitrator's award finding a higher duty on the part of union officials concerns the same conduct.

In "How Arbitration Works," E. Elkouri and F. Elkouri, The Bureau of National Affairs (1978), the authors state at p. 388: "It must be emphasized that a great contribution to industrial stability lies in the probability that many of the disputes are settled by the parties themselves before reaching arbitration because they are aware of prior awards on the issue involved . . . ." Similarly, arbitral awards influence the conduct of the parties and the course of contract negotiations. As will be set forth, *infra*, the arbitrator's award in the instant case is completely consistent with the great bulk of arbitral precedent. It is especially unfortunate that the Board has unnecessarily tried to alter the balance previously struck in this area.

Inc.,[47] the employer refused to pay striking employees vacation benefits accrued under a terminated collective-bargaining agreement while it announced an intention to pay such benefits to striker replacements, returning strikers, and nonstrikers who had been at work on a certain date during the strike. Noting that "there can be no doubt that the discrimination was capable of discouraging membership in a labor organization," the Supreme Court cautioned that "the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose."[48] The Court set forth "several principles of controlling importance" in determining whether an employer's conduct violates Section 8(a)(3):

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight" an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.[49]

Significantly, the Court stated "even if the employer does come forward with counter explanations for his conduct in this situation [where conduct is "inherently destructive"] the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the *proper balance* between the asserted business justifications and the invasion of employee rights in the light of the Act and its policy." (Emphasis supplied.)[50] Since the company in *Great Dane* presented no evidence of legitimate motives for its discriminatory conduct, the court sustained the Board's finding of a violation there without deciding whether the conduct was inherently or only slightly destructive of employees' rights.

Great Dane followed *American Shipbuilding*[51] in which the Supreme Court found no violation of Section 8(a)(3) despite conduct which might, in some fashion, have discouraged union activity. In upholding the legality of an offensive lockout designed to bring pressure on a union to modify its demands at the bargaining table, the court stated "we have consistently construed the section [8(a)(3)] to leave unscathed a wide range of employer actions taken to save legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership."[52]

The Board, similarly, has found numerous instances where employer conduct, though literally tending to encourage or discourage union activity, is not violative of Section 8(a)(3) because it is either lacking discriminatory motivation or the resulting impact on union activity is incidental to preservation of a legitimate and substantial business interest of the employer. I refer to these cases not necessarily because I agree with the results, but because they are illustrative of areas where the Board has had to apply the balancing analysis mandated by the Supreme Court. That is, the Board has balanced an employer's business interest in keeping labor costs within reasonable bounds against the impact on employees' Section 7 rights to strike because of the employer's denial of sick leave benefits to strikers incapacitated during a strike; an employer's business interest in maintaining its vacation policies against the impact on sympathy strikers of the employer's denial to the striker of payment of a lump sum in lieu of vacation time, or of requiring strikers to prorate their earned vacation benefits; an employer's decision to transfer nonunit employees but not unit employees to its relocated plant, after reaching agreement with the union, against the impact on the Section 7 rights of the employees not transferred; and an employer's decision to relocate its operations because of the severe losses suffered against the impact on the employees' losing their jobs and their union representative.[53]

I note that the problem of conflicting policies also exists in an area that involves treating stewards differently from other employees. The Board has found that although superseniority for union stewards, at least as to layoff and recall, ties certain benefits to union activities, "such discrimination as it may create is simply an incidental side effect of a

[47] 388 U.S. 26 (1967).
[48] *Id.* at 33.
[49] *Id.* at 34.
[50] *Id.* at 33–34.
[51] 380 U.S. 300 (1965).
[52] *Id.* at 311. See also *Ottawa Silica Company*, 197 NLRB 449 (1972).
[53] See, e.g., *Kansas City Power & Light Company*, 244 NLRB 620 (1979); *G. C. Murphy Company*, 207 NLRB 579 (1973); *C. F. Martin & Co., Inc.*, 252 NLRB 1192 (1980); *Lee Norse Company*, 247 NLRB 801 (1980); *Co-Ed Garment Company*, 231 NLRB 848 (1977).

more general benefit accorded all employees,"[54] i.e., the effective administration of collective-bargaining agreements. The Board, in other words, found no violation of Section 8(a)(3) in some cases involving superseniority for union stewards or officials,[55] because the employer's legitimate justification—the effective administration of the contract—outweighed the impact on the employees' Section 7 rights.

Clearly, then, a determination that conduct violates Section 8(a)(3) involves more than a finding that that conduct may literally have a tendency to encourage or discourage union activity. And, applying the mode of analysis required by *Great Dane* to the type of employer conduct at issue here, I would find that although such conduct may tend to discourage some union activity the impact of that conduct is incidental to the more important consideration of effective administration of collective-bargaining agreements. Therefore, that conduct is not violative of Section 8(a)(3) of the Act.[56]

I conclude that inherent in a no-strike clause is a duty on the part of stewards and other union officials to abide by and enforce that clause. Such a conclusion is compelled by and inherent in the preeminent national labor policy favoring the peaceful resolution of labor disputes through mutually agreed upon means.

In this regard, Section 203 of the LMRA (29 U.S.C. § 173(d)) provides:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

And the Supreme Court stated in its Steelworkers Trilogy:

> The present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.[57]

In the Steelworkers Trilogy the Court viewed the parties' choice to commit their disputes to arbitration as between having an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces."[58] Thus, the Court found that a "collective bargaining agreement is an effort to erect a system of industrial self-government" and "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government."[59] In support of this policy favoring arbitration, the Court found that, while a party need not agree to have all disputes covered by the arbitration clause, "[d]oubts should be resolved in favor of coverage."[60]

Deemed essential to the effective functioning of arbitration agreements is the no-strike obligation, found by the Court to be "the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration . . . ."[61] So important is this obligation not to strike that the Supreme Court infers the existence of a no-strike obligation merely from the presence in a collective-bargaining agreement of a compulsory terminal arbitration clause. Noting that both courts and the Board had made such an inference in earlier cases, the Court said in *Lucas Flour Company*,[62] "To hold otherwise would obviously do violence to accepted principles of traditional contract law. Even more in point, a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare."[63]

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[54] *Dairylea Cooperative, Inc.*, 219 NLRB 656, 658 (1975). Contrary to the majority's bald and inconsistent rejection of this principle, selective punishment of union officers for breach of a no-strike clause clearly benefits the employees and the parties to the contract equally if not more than a superseniority clause. The employer has *immediate* means to enforce the no-strike obligation and require the union officers to continue working and thereby lead the employees back to work. The employer will be more amenable to comply with the contractual grievance procedures for as long as production continues, and the leadership and influence of the union with the employees will be enhanced. The employees will benefit from diminished interruption, if any, in their paychecks, and will also be more secure in resolution of their grievances through the collective-bargaining process. The benefit to the public is obvious in the diminished likelihood of illegal strikes, resulting in less interruption of commerce, one of the avowed purposes of the Act.

[55] I do not express any view as to the correctness of the Board's *Dairylea* decision. I simply note that the Board applied the balancing analysis which the Supreme Court mandated and which I apply here.

[56] I note that there is no evidence whatsoever that Respondent's conduct was, in fact, motivated by union animus. Accordingly, consistent with *Great Dane*, I need only decide whether Respondent's conduct was inherently destructive of employee rights. I disagree with the majority that punishment of union officers alone for participation in an illegal strike amounts to punishment for "*being* something (a union officer) rather than for *doing* something (participating in an unauthorized work stoppage)." The syllogism is defective since, absent participation in the illegal conduct, union status is irrelevant. Further, the essence of discrimination lies in different treatment of individuals who are similarly situated. As the Board has long recognized, union officials have rights and duties which set them apart from rank-and-file employees, and the finding of unlawful discrimination in fact may turn on the status of the employee.

[57] *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 363 U.S. 574, 578 (1961).

[58] *Id.* at 580.

[59] *Id.* at 581.

[60] *Id.* at 583.

[61] *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 248 (1970). See also *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 455 (1957).

[62] *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Lucas Flour Company*, 369 U.S. 95 (1962).

[63] *Id.* at 105.

As might be expected, the Supreme Court has been equally emphatic in preserving the means by which such no-strike obligations may be enforced. Thus, *Lucas Flour, supra,* involved a damages action for a breach of the implied no-strike obligation. In *Boys Markets, Inc.*,[64] the Court endorsed injunction relief for violation of no-strike clauses, pointing out that:

> We have frequently noted . . . the importance that Congress has attached generally to the voluntary settlement of labor disputes without resort to self-help and more particularly to arbitration as a means to this end. Indeed it has been stated that *Lincoln Mills,* in its exposition of Section 301(a), "went a long way towards making arbitration the central institution in the administration of collective bargaining contracts."

Boys Markets was followed by *Gateway Coal Co.*,[65] in which the Court found injunctive relief might also be granted based on an *implied* undertaking not to strike.

In *Boys Markets, Inc.*, the Court noted that while an employer has recourse in a suit for damages under Section 301 of the Act such an "award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union."[66] Carrying this a step further, while for purposes of national policy it is more important to halt an illicit strike than to provide redress later, it is still more important to prevent a strike altogether than to halt it once it is underway. In this respect, the deterrent value of a suit for damages under Section 301 is attenuated by the passage of time and its theoretical nature. Injunctive relief also falls short of the most effective enforcement of a no-strike obligation. It is clearly designed to put an end to strikes already undertaken and, as a practical matter, if the strike is unauthorized and cannot be traced to the union itself, the deterrent value of the employer's redress may be limited.

In light of these factors another option is available—the discipline or discharge of employees involved in the illicit strike. As the Supreme Court has stated, "It is universally accepted that the no-strike clause in a collective-bargaining agreement at the very least establishes a rule of conduct or condition of employment the violation of which by employees justifies discipline or discharge."[67] Further, an employer faced with mass action by its employees is not obligated to discharge or discipline every employee who engages in an illicit strike but may selectively discipline employees.[68] In this regard, by far the most immediate and therefore effective way to prevent such illicit strikes is in the employer's right to enforce the contracts' strike prohibition by disciplining or discharging "the steward or some other union official close to the scene who has the power, authority and influence most effectively to quash an illegal strike during its infancy or to prolong it indefinitely."[69] In *Eazor Express, Inc.* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 520 F.2d 951, 964, fn. 6 (3d Cir. 1975), cert. denied 424 U.S. 935 (1976), the court stated:

> That . . . discipline has been successfully used by a Teamsters local and that its use might well have been successful here is indicated by the case of an unauthorized strike by members of Local 241 of the Teamsters International Union against Eazor at Sharon, Pennsylvania in April 1968 where the strike was ended when a steward who refused to cross the illegal picket line was removed by the officers of the local union and another put in his place who led most of the strikers back to work across the picket line.

Reflecting the importance of this right to the enforcement of no-strike obligations, arbitrators have recognized almost without exception that stewards and usually other union officials have a higher duty

[64] *Boys Markets, Inc., supra,* 398 U.S. at 252.

[65] *Gateway Coal Co.* v. *United Mineworkers of America,* 414 U.S. 368 (1974).

[66] *Boys Markets, Inc., supra,* 398 U.S. at 248.

[67] *Atkins* v. *Sinclair Refining Company,* 370 U.S. 238, 246 (1962), overruled on other grounds. See also *Food Fair Stores, Inc.* v. *N.L.R.B.*, 491 F.2d 388, 395 (3d Cir. 1974).

[68] *Chrysler Corporation,* 232 NLRB 466 (1977), and *McLean Trucking Co.*, 175 NLRB 440 (1969).

Arbitrators have consistently made similar findings. See, e.g., *Abex Corp.*, 68 LA 805 (1977) (Rothman, Arb.), and *ITT Abrasive Products,* 58 LA 595 (1972) (Geissinger, Arb.). Also, in "How Arbitration Works," the authors state at p. 645: "Arbitrators have emphasized that in illicit strike or slowdown situations, the employer need not deprive himself of the services of all participants but may use selective discipline on the basis of relative fault." "How Arbitration Works," E. Elkouri and F. Elkouri, The Bureau of National Affairs (1978). See also "The Protected Rights of the Union Steward," Yaffe, Byron: *Industrial and Labor Relations Review,* 4:23 (1970). I believe that my colleagues in the majority would agree with this proposition even where union stewards are involved, to the extent that it sanctions selective discipline based on degree of responsibility for a strike in violation of a no-strike clause. See, for example, *Midwest Precision Castings,* 244 NLRB 597 (1979).

[69] *Gould, Inc.* v. *N.L.R.B., supra,* 612 F.2d at 733. The majority disagrees with the court's opinion in *Gould,* but yet seeks to take me to task for citing the court's language "out of context." The majority's comment is nonsensical since first I agree with the result in *Gould* as far as it goes, the difference being that I would find such an obligation for affirmative action by stewards implicit in a no-strike clause, and secondly, whether the affirmative duty is either explicit or implicit has no discernible bearing on the question of the most effective method of deterring illegal strikes.

to abide by and enforce a no-strike obligation than rank-and-file employees.[70] In this regard, the following statement from Arbitrator Schmertz' award in *United Parcel Service, Inc.*, 47 LA 1100–01 (1966), is frequently quoted:

> If there is one principle that is universally recognized in the field of industrial relations, it is that shop stewards have the highest duty to faithfully adhere to all of the provisions of the Collective Bargaining Agreement and to actively instruct each employee to do so as well. While it is improper for an ordinary employee to deliberately breach the Agreement, a similar act by a shop steward is untenable and grounds for his discharge. It is the obligation of the steward to set an example for all Union members within his jurisdiction by demonstrating his loyalty to the terms and conditions of the contract negotiated by his Union with the Employer.

Significantly, the arbitrators have rarely referred to specific contract language in finding this duty. Rather, they have found this duty in what the Supreme Court has defined as "the industrial common law"[71] and their informed judgment concerning the dynamics of the collective-bargaining relationship at hand and how best to further its viability. Generally, the arbitrators rely on the stewards' and/or union officials' inherent role of direction and leadership along with their special knowledge of the contract and daily role in administering it. Arbitrators also refer to the special significance to the employees of action or inaction by a union steward simply by virtue of his status as the steward.[72] Often this is referred to in terms such as those used by Arbitrator Steward in *International Harvester Company*, 14 LA 986, 988 (1950):

> By virtue of his office a Union [officer] has a special obligation to observe the Agreement. It is his contractually recognized function to protect employees in the grievance procedure against violation of that Agreement by Management . . . . He cannot with impunity turn his back on the very Agreement which it is his duty to defend.
>
> By virtue of his office . . . a Union officer is a leader; indeed, it is reasonable to assume that it is because he is a leader that he acquires his Union office. It follows inescapably that when a Union officer participates in work stoppage—making no effort to prevent it or bring it to a close—he is setting an example for the other employees and indicating by his actions that the stoppage has his tacit approval and sanction. This is a graver offense than participating by an ordinary employee and justifies a more serious penalty.

Of course the Board is not bound by arbitral precedent. To ignore this remarkably consistent "industrial common law," however, when balancing the policy considerations in so important an area as enforcement of no-strike obligations is neither good sense, nor good law. For all the foregoing reasons, then, I find that inherent in the collective-bargaining system envisioned by Congress and the Supreme Court is a higher duty on the part of stewards and union officials[73] to abide by and enforce a no-strike obligation.

Accordingly, applying the Supreme Court's *Great Dane Trailers* test, I find that Respondent's conduct here is not violative of Section 8(a)(3). Although literally, on a superficial level, the committeemen here were singled out for greater discipline because they were union officials, this was because of their *breach* of a special duty[74] inherent in their collective-bargaining agreement imposed on persons holding union office and not merely because they were holding union office. Greater discipline commensurate with the stewards' greater responsibility and the graver implications of steward action (or inaction) is hardly discriminatory, much less inherently destructive of employee rights. In the words of the Third Circuit in *Gould, Inc., supra:*

> . . . logically no prejudice to employee rights can result where the employee is merely de-

[70] See, for example, *Abex Corp.*, 68 LA 805 (1977) (Richman, Arb.); *Koehring Co.*, 69 LA 459 (1977) (Boals, Arb.); *Powermatic/Houdaille*, 65 LA 1245 (1976) (Byars, Arb.); *Parker Co.*, 60 LA 473 (1973) (Edwards, Arb.); *Stokely Van-Camp, Inc.*, 60 LA 109 (1973) (Karasick, Arb.); *ITT Abrasive Products Co.*, 58 LA 595 (1972) (Geissinger, Arb.); *General Fireproofing Co.*, 56 LA 1118 (1971) (Williams, Arb.); *McConway & Torley Corp.*, 55 LA 31 (1970) (Cohen, Arb.); *Acme Boot Co.*, 52 LA 585 (1969) (Oppenheim, Arb.), and *Sealright Co., Inc.*, 53 LA 154 (1969) (Belcher, Arb.). The arbitrator's awards in the instant case are fully consistent with this precedent.

The majority does not directly deny that the arbitrators have so ruled, but instead seeks to undercut the import of such rulings by a selective and misleading description of the holdings on the facts in some cases. Each case, however, sets forth and reaffirms this principle, as for example, *Acme Boot Co.*, 52 LA 585, 588 (1969) (Oppenheim, Arb.), where the arbitrator reiterated the language in *United Parcel Service, infra.* See, also *Mack Trucks, Inc.*, 41 LA 1240 (1964) (Whalen, Arb.), and *Drake Mfg. Co.*, 41 LA 732 (1963) (Markowitz, Arb.).

[71] *United Steelworkers, supra*, 363 U.S. at 581–582.

[72] See, e.g., *Sealright Co., Inc.*, 53 LA 154 (1969) (Belcher, Arb.).

[73] There may be occasions where a union official has such minimal authority or is so removed from administration of the contract and the collective-bargaining process that he has no agency status or apparent authority and the higher duty will not redound to him. The union committeemen here are certainly not within this category.

[74] The duty of union agents to enforce the no-strike clause is that which would be expected of a reasonable man. While the language of the collective-bargaining agreement or its history in any particular situation may show that the parties have agreed either to increase or to reduce the burden of that duty, in the absence of such "law of the plant" or specific contract language, that duty includes at least an obligation to urge employees to comply with the contract and to continue working themselves.

terred from engaging in illegal activity and from breaching a contractual obligation, neither of which he has a *right* to do. As for the contention that as a result of this ruling prospective stewards will be dissuaded from seeking union office, the obvious and short answer is that they should be deterred from seeking office if they intend thereafter to participate in illegal work stoppages or to repudiate contract obligations . . . .[75]

Moreover, the policy considerations justifying the employer's exercise of its right to discipline union officials for breach of their higher duty are manifold. The strong public interest in peaceful labor relations, which can be achieved only by effective administration of collective-bargaining contracts, justifies the employer's action herein enforcing the no-strike obligation. It is self-evident that the parties have important interests at stake in adherence to a no-strike clause and grievance/-arbitration procedures. Thus, it is to be presumed that both parties have an interest in the continued viability of their agreement. And in labor contracts, as well as other contracts, failure to adhere to the contract by either party will undermine its strength as a binding document on both parties. And, the Board has long recognized the employer's pressing interest in continuing to operate its business,[76] without interruption by unnecessary labor strife, refuge from which is what an employer expects above all else to derive from its participation in the collective-bargaining process.

Accordingly, in view of all the foregoing, I find no violation of Section 8(a)(3) and (1) of the Act here in Respondent's imposing harsher discipline on the union committeemen for failing to meet their duty inherent in the collective-bargaining agreement's no-strike obligation.

[75] *Gould, Inc.* v. *N.L.R.B., supra*, 612 F.2d at 733.

[76] See, e.g., *Redwing Carriers, Inc.*, 137 NLRB 1545 (1962), enfd. 325 F.2d 1011 (D.C. Cir. 1963).

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against employees in regard to hire or tenure of employment, or any term or condition of employment, because of their union or protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act except to the extent that such rights may be affected by lawful agreements in accordance with Section 8(a)(3) of the Act.

WE WILL offer to Willard Blair, Jr., and Gary L. Riggs immediate and full reinstatement to their former positions or, if such positions no longer exist, to a substantially equivalent position, without prejudice to their seniority or other rights previously enjoyed, and make them whole, with interest, for any loss of pay or other benefits suffered by reason of the discrimination against them.

WE WILL expunge from our records and files any and all references to the unlawful suspensions and discharges of Willard Blair, Jr. and Gary L. Riggs, and WE WILL notify them in writing, that this has been done and that evidence of these unlawful suspensions and discharges will not be used as a basis for future personnel actions against them.

All our employees are free to become or remain, or refrain from becoming or remaining members of any labor organization, except to the extent as may be limited in accordance with Section 8(a)(3) of the Act.

CONSOLIDATION COAL COMPANY

DECISION

STATEMENT OF THE CASE

JERRY B. STONE, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was heard pursuant to due notice on December 11, 1980, at Fairmont, West Virginia.

The charge was filed on March 11, 1980. The complaint in this matter was issued on August 21, 1980. The issues concern (1) whether this proceeding concerning whether Respondent terminated Willard Blair, Jr. and Gary L. Riggs on February 20, 1980, in violation of Section 8(a)(3) and (1) of the Act, should defer to the arbitration decision of Carl F. Stoltenberg issued on March 12, 1980, and, if not, (2) whether Respondent terminated Willard Blair, Jr., and Gary L. Riggs on February 20, 1980, in violation of Section 8(a)(3) and (1) of the Act.

All parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by the General Counsel and Respondent and have been considered.

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:[1]

[1] Errors in the transcript have been noted and corrected.

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

The facts herein are based upon the pleadings and admissions therein.

At all times material herein, Consolidation Coal Company, Respondent, a corporation with an office located in Pittsburgh, Pennsylvania, and a place of business located at Mine No. 20, Four States, West Virginia, herein called Respondent's facility, has been engaged in the mining and nonretail sale of coal.

During the 12-month period ending February 29, 1980, Respondent, in the course and conduct of its operations described above, sold and shipped from its West Virginia facility products, goods, and materials valued in excess of $50,000 directly to other enterprises located outside the State of West Virginia.

As conceded by Respondent and based upon the foregoing, it is concluded and found that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED[2]

United Mine Workers of America, Local 4060, herein called the Union, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Preliminary Issues; Supervisory Status*[3]

At all times material herein, Barry Dangerfield occupied the position of superintendent of Respondent's facility, and is now, and has been at all times material herein, a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

B. *The Facts*[4]

1. The dispute

Apparently in September 1979, employee Lou Kolders had complained to Mike Zemonick, president of the local union, Local 4060 of the UMWA, that he was not getting assigned certain work as a lampman when the regular lampman was off and that he was entitled to the same because of his seniority as compared to the person who was receiving such assignment. Zemonick told Kolders to talk to Superintendent Dangerfield and that maybe he could get the matter straightened out. Kolders later told Zemonick that he had talked to Dangerfield and that Dangerfield had told him that he would be assigned the lampman's position when Morgan, the regular lampman, was off. Apparently thereafter until February 18, 1980, Kolders was assigned the lampman's job whenever Morgan was not at work.

On the morning of February 18, 1980, Morgan, the regular lampman on the day shift, did not report to work. It appears that there were a number of employees absent from work on February 18, 1980, and that Respondent had some problems in juggling work assignments. In any event, an employee named Leeper was apparently assigned to work as a lampman, the job normally held by Morgan. Kolders, around 7:30 a.m., complained to Zemonick and to Blair, chairman of the Mine Committee, that he was more senior than Leeper and entitled to the assignment to the lampman's work. Zemonick and Blair told Kolders to go and talk to Superintendent Dangerfield.

Kolders went to see Superintendent Dangerfield, told Dangerfield that Morgan was off, and asked about the lampman's job. Dangerfield told Kolders that he did not know who was off and who was going to be doing the lampman's job. Kolders told Dangerfield that he (Kolders) was the senior man. Dangerfield told Kolders that seniority had nothing to do with the job assignment, that seniority helped on job bidding and on layoffs. Kolders asked if his filing of a grievance had anything to do with his not getting the job. Dangerfield and Foreman Freeman[5] told Kolders that the filing of the grievances had nothing to do with his getting the job or anything.

Kolders left Dangerfield's office and returned to the Mine Committee.[6] Kolders reported what had occurred in his discussion with Dangerfield and asked the committee to take the matter of the job assignment up with Dangerfield. Thereafter, around 7:50 a.m., the Mine Committee, consisting of Local Union President Zemonick, Committee Chairman Blair, and committeeman Riggs, went to Mine Superintendent Dangerfield's office. Upon entering Dangerfield's office, Zemonick approached Dangerfield's desk and pushed some papers which were on the desk. Zemonick told Dangerfield that Dangerfield was always pushing, that Dangerfield had a swelled head.[7] Zemonick told Dangerfield that they had formerly been settling problems but now could not get anything settled. Dangerfield told Zemonick that if he were going to talk like this that he would not talk to

[2] The facts are based upon the pleadings and admissions therein.

[3] The facts are based upon the pleadings and admissions therein.

[4] The facts are based upon a composite of the credited aspects of the record testimony of Dangerfield, Freeman, Hudak, Blair, Michael, Riggs, Satterfield, Skinner, Shearer, Tarley, Urich, and Zemonick as reflected in the exhibits relating to the arbitration proceedings concerning the discharges of Zemonick, Blair, and Riggs on or about February 18, 1980, and upon the credited aspects of the testimony of Phillips. The credibility resolutions are based upon a consideration of those facts which are undisputed and in effect testified to by witnesses having different interests, and upon consideration of the logical consistency of all facts. Testimony of witnesses inconsistent with the facts found is discredited. As later set forth, I have determined that the arbitration decisions relating to the February 20, 1980, discharges of Blair and Riggs should not be honored. For such determination, I accepted the facts as found by the arbitrator as the underpinning facts for such decisions. Having found that the arbitrator's decisions should not be deferred to, the facts found herein are facts as determined by me.

[5] Freeman came into Dangerfield's office while the conversation between Dangerfield and Kolders was going on.

[6] Apparently the Mine Committee was at the "Bath House."

[7] I credit Zemonick's testimony to the effect that he said, "We are getting a little swell headed." However, I am persuaded that the intended meaning by him and the understanding by Dangerfield was that Dangerfield was "swell headed."

him. The atmosphere calmed down and Zemonick stated, "What about the lamp man job today? Lou Kolders is the senior man, and you are going to have to put him on that job." Dangerfield told Zemonick that he did not know who was going to be doing the lampman's job that day, that there was a local agreement that stated that the Company could put anyone on the job it wanted to. Zemonick raised the question of which took precedent, the contract or local agreement. Zemonick told Dangerfield that he thought the local agreement was in conflict with the (national) contract. Zemonick told Dangerfield that Kolders was the senior man and that Dangerfield had to put him on the job.

About this time Mine Foreman Freeman came into Dangerfield's office and heard part of the discussion about who was to be assigned to the lampman's job. Freeman told Zemonick that Dangerfield did not know who was being assigned, that Dangerfield did not make such assignments.

Dangerfield told Zemonick that there was also an arbitrator's decision that said that, once an employee was trained, the employee did not have to be placed (temporarily) on the job if he were qualified. Dangerfield told Zemonick that Kolders had asked to be trained, had been trained, and that the Company considered him to be qualified for the job. Zemonick stated that he wanted to see such decision. The referred-to decision was located and given to Zemonick. Around this time Freeman apparently left the office to carry on his duties otherwise.

Zemonick told Dangerfield that he (Dangerfield) had made an agreement with Kolders to settle Kolders' grievance about getting such assignment, that he (Dangerfield) should live up to the agreement. Zemonick stated that the committee considered that Dangerfield had settled a grievance with Kolders about the assignment to the lampman's job. Zemonick argued that there was question as to how long a person had to work to be qualified, that four or five times on the job did not qualify a person, that the agreement indicated that one might be on the job for a period of 50 days and not be qualified.

Around this time, approximately around 8 a.m., Foreman Freeman returned to Dangerfield's office and gave Dangerfield a report on absenteeism which Dangerfield commenced to study. About this time Mine Committee Chairman Blair and Foreman Freeman spoke about the "preferred job program" and a request that an employee named Jack Pethtel had to be trained on a pumping job and an apparent failure of Respondent to go by the plan. Freeman told Blair that he would check into the matter. While Dangerfield was talking to Freeman, the committeemen, Zemonick, Blair, and Riggs, remained in the office. Shortly after 8 a.m. Dangerfield turned toward Zemonick and stated, "Mike, what are you still doing here?" Zemonick told Dangerfield that the committee was not leaving until they got something straightened out. Dangerfield told Zemonick that he wanted him to go to work, that he wanted him to go to work at that time. Zemonick asked Dangerfield what he was going to do if he went on union business. Zemonick told Dangerfield that he was relieving himself and the other committeemen from work and going to the District's office on official union business. Dangerfield told Zemonick that as far as he was concerned that Zemonick did not have any union business, that the issue was settled, that the Company had the ARB (arbitration) decision and the local agreement. Thereupon, the Mine Committee left the superintendent's office.[8]

In the meantime, most of the employees who were scheduled to go to work at 8 a.m. had dressed and assembled in the lamp room but had not gone to the elevator to go into the mine.[9] Several of said employees were headed toward the elevator around 8:05 a.m. Two of the employees apparently had gone into the mine. Around this time Zemonick, Riggs, and Blair walked through the lamp room and into the bathhouse. Most if not all of the employees scheduled to work on the day shift followed the Mine Committee into the bathhouse.

In the bathhouse Zemonick stood on a bench and commenced speaking to the employees. Zemonick told the employees that they should go to work, and that the Mine Committee was relieving itself from work and going to go on official union business and go to the local union's district office. Some of these employees were from a shift going off work, and others were from the shift scheduled to report to work at 8 a.m. At some point of time Blair told one or two fellow employees that they should go to work while the committee went to the Union. Zemonick, Blair, Riggs, Skinner, and Shearer all credibly testified to the effect that Zemonick told the employees to go to work. There is no testimony or evidence to contradict such testimony. I find no reason to believe the opposite as to what was testified to. Had there been evidence to the contrary effect, it would appear that the same would be forthcoming from some of the other potential witnesses (approximately 70 in number) and that the party desiring to establish such point would have to present such evidence. No inference is drawn from the failure to present such evidence. However, an inference contrary to sworn testimony is not to be drawn either. In the meantime Foreman Freeman had followed the Mine Committee from the superintendent's office and had observed what was happening. Freeman returned to Dangerfield's office and told Dangerfield that the employees were not reporting to work. Almost immediately Superintendent Dangerfield and Foreman Freeman proceeded to the bathhouse.

Dangerfield spoke to Zemonick and told him that Kolders was qualified for the lampman's job, that if it came open he (Kolders) could bid for it. Dangerfield

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[8] I note that Freeman's testimony was at one point to the effect that he heard a discussion about the committee relieving itself. Further, I found Riggs' testimony most persuasive and credit the facts that Zemonick did tell Dangerfield and Freeman that the committee was relieving itself. I note that Riggs admitted that later he (Riggs) did not tell the employees to go back to work. I credit Dangerfield's denial that he authorized or approved Zemonick's relieving the committee from work. Further, there was some litigation as to whether Respondent's Vice President Hudak had stated that committee members, if necessary, could relieve themselves for official union duties. It is not necessary in this case to resolve whether Hudak had granted such policy on a broad basis so as to cover the situation herein.

[9] The record indicates that there were around 92 employees on the day shift and that there were 19 absences on the morning of February 18, 1980.

then speaking toward Zemonick said, "I want you to go to work."

Dangerfield asked Zemonick what he was doing. Zemonick told Dangerfield that he was having a union meeting. Dangerfield told Zemonick that he could not have a union meeting when it interfered with production. Zemonick told Dangerfield that he had instructed the men to go to work. Dangerfield waved his hands in the air and, addressing all of the employees, told them that he wanted all of them to go to work. Dangerfield and Freeman then left the bathhouse and returned to Dangerfield's office.

A short time later Dangerfield and Freeman returned to the bathhouse. Some of the employees were undressing. Zemonick was talking to some employees and Riggs. Superintendent Dangerfield asked Zemonick what was going on. Zemonick told Dangerfield that the men were going home. Dangerfield told Zemonick that he wanted the men to go to work. Zemonick told Dangerfield that the matter could have been settled if Dangerfield had put Kolders on the lampman's job.

Dangerfield and Freeman left the bathhouse en route to return to Dangerfield's office. Dangerfield and Freeman apparently came in contact with dispatcher Ford outside the bathhouse. Ford asked Dangerfield whether he wanted him to call "the other side" (apparently of the mine) and tell them that the men were not working. Dangerfield told Ford that he did not have to call "the other side," but if he were called and asked, that he could tell them that the men had gone home. Following this, Dangerfield and Freeman went to Dangerfield's office and reported the events to Dangerfield's superiors.

2. The work stoppage

As has been indicated, only two of the employees scheduled to go to work at 8 a.m. on Freeman's shift had gone into the mines prior to the meeting that Zemonick had with employees around 8:05 a.m. None of the other employees, apparently around 70 in number, went into the mine after Zemonick's meeting with employees discussed above. Thus, there occurred a mine shutdown for Mine No. 20 on February 18, 1980.

3. The discipline of Zemonick, Blair, and Riggs

On February 18, 1980, Respondent transmitted identical letters to Zemonick, Blair, and Riggs setting forth as follows:

> You are hereby notified pursuant to Article XXIV, Section (b) that you are suspended with intent to discharge for your irresponsible actions of insubordination, and instigation of an unauthorized work stoppage at Mine No. 20 on Monday, February 18, 1980.
>
> Pursuant to the requirements of XXIV(b) you shall be afforded the right to meet with me after 24 hours, but within 48 hours.

Thereafter, on February 20, 1980, Zemonick, Blair, and Riggs apparently met with company management and discussed the matter of suspension and discharge. Grievances were filed and denied, and it was clear that the employees were in effect terminated subject to such rights as were had under the collective-bargaining agreement as to arbitration and grievances.

The suspension and discharge of Zemonick was presented to an arbitrator for decision on February 28, and the suspension and discharges of Blair and Riggs were presented to the same arbitrator for decision on February 29, 1980. Thus, an arbitration hearing was held on February 28, 1980, as to the Zemonick discharge, and a hearing was held on February 29, 1980, for the Blair discharge. The record for the Zemonick arbitration proceeding was incorporated into the record for the Blair arbitration proceeding, and it was agreed that the Blair record would serve for the record for the Riggs arbitration determination.

On March 12, 1980, arbitrator Carl F. Stoltenberg upheld the discharge of Zemonick in a written decision. On the same date arbitrator Carl F. Stoltenberg, in separate written decisions, reduced the discharges of Blair and Riggs to a suspension of 30 working days.

4. The reasons for the discipline of Blair and Riggs

The parties entered into a stipulation of facts at the hearing of this matter as revealed by the following excerpts from the record:

> MR. GREEN: Your Honor, General Counsel also proposes the following stipulations.
>
> * * * * *
>
> MR. GREEN: Number one, Blair, Riggs and Zemonick were the only, mine number twenty employees, disciplined as a result of the events of February 18, 1980.
>
> * * * * *
>
> Number two, Respondent charged Blair and Riggs with insubordination and instigation of the February 18, 1980 work stoppage on the basis of a failure, as members of the mine committee, to go to work in response to the general work order issued by superintendent, Barry Dangerfield, D-A-N-G-E-R-F-I-E-L-D, in the bathhouse, which served from Respondent's view as Blair and Riggs' approval of the wildcat strike, and on the basis that their failure, as members of the mine committee, to make a reasonable effort at any time on February 18 to avoid the strike.
>
> Respondent acted upon the belief that Blair and Riggs, by virtue of their position as members of the mine committee, had a greater responsibility and could be held to a greater degree of accountability under these circumstances, than employees not serving on the mine committee.
>
> Number three, at the time of the arbitration hearing for Willard Blair Jr. the UMWA and Consolidation Coal Company agreed that the record in the case of Blair would serve as a record for the case of Gary Riggs also.
>
> That's the stipulations, your Honor.

JUDGE STONE: You join in those?
MR. STEPTOE: So stipulated.
JUDGE STONE: All right, stipulation received.

C. *Miscellaneous*

1. Respondent and Local 26 are parties to a collective-bargaining agreement containing arbitration and grievance clauses giving rise to an implied agreement by the agreement that strikes will not be undertaken to solve disputes subject to the grievance-arbitration procedure.[10] Further, the General Counsel conceded at the hearing that the work stoppage on February 18, 1980, was an illegal work stoppage. Whether this is precisely so or not, it is clear that this case was litigated on the narrow issue that the discipline of Blair and Riggs was discriminatory because such discipline was imposed on a selection based upon their being mine committeemen.

2. There are provisions in the controlling collective-bargaining agreement having some bearing on the understanding of the issues in this case. Such provisions are as revealed by the following excerpts from said bargaining agreement:

ARTICLE XXII—MISCELLANEOUS

Section (4) Local Union Meeting Place

At each of the mines covered by this Agreement, the Employer agrees to permit the local union to use the bath-house as a meeting place, provided, however, that such use does not interfere with production or the intended use of these facilities.

* * * * *

ARTICLE XXIII—SETTLEMENT OF DISPUTES

Section (a) Mine Committee

. . . The duties of the Mine Committee shall be confined to the adjustment of disputes arising out of this Agreement that the mine management and the Employee or Employees fail to adjust. The Mine Committee shall have the authority on behalf of the grievant to settle or withdraw any grievance at step 2 or proceed to step 3. The Mine Committee shall have no other authority or exercise any other control nor in any way interfere with the operation of the mine; for violation of this section any and all members of the committee may be removed from the committee.

A mine committee member shall not be suspended or discharged for his official actions as a mine committee member . . . .

3. Respondent presented testimony through William Phillips to the effect that he was Respondent's regional manager of industrial employee relations, was experienced in the handling of grievances, that it was his opinion that mine employees had a high regard for the mine committeemen, and that it was his opinion that if a mine committeeman refused to work that the other rank-and-file employees would also refuse to work. On cross-examination Phillips testified to the effect that he knew that there was a solidarity among mine employees and that such employees usually acted in concert and that unauthorized strikes could be initiated by rank-and-file employees.[11]

D. *The Arbitration Decisions*

1. The arbitration decision of March 12, 1980, set forth the following with respect to Gary Riggs:

> Inasmuch as the President of the Union was the sole spokesman during the critical period on the morning of February 18, 1980, and inasmuch as the Grievant did not assume any role of leadership, there can be no finding that the Grievant instigated the unauthorized work stoppage.
>
> At the same time it is observed as significant that the Grievant did not obey the general back to work order of the Superintendent and that he did join with the rest of the employees in the unauthorized work stoppage. At first glance it might appear that the Grievant's transgressions were no greater than those of any other employee who participated in the Wildcat strike. However, an officer of a Local Union has a greater responsibility for observance of a no-strike rule than do the rank and file members. Thus, when the Grievant, as a member of the Mine Committee, joined the walkout, he was lending the credibility of his office to that illicit action.
>
> While the Grievant's actions did not constitute instigation of the Wildcat Strike, they do serve to establish an abrogation of his responsibility as a Local Union Officer and moreover, his refusal to obey the Superintendent's general back to work order which was given to all of the employees, was in any event, an act of insubordination.
>
> The record reveals that the nature of the Grievant's insubordination did not manifest itself in the form of a refusal of a direct personal order to return to work, but rather, that of a general order given to all of the employees present in the Bath House. When this fact is considered in view of the Grievant's six years of employment which is absent disciplinary citation, and particularly in view of the finding *supra*, that he did not instigate the Wildcat strike, it must be found that the penalty of discharge in this instance is too severe.
>
> Accordingly, the Grievant's discharge is reduced to a thirty-day suspension for failure to exercise the authority of his office and for failure to obey the general back to work order.

Thus, the arbitrator reduced Riggs' discharge to a 30-day suspension.

2. The arbitrator's decision of March 12, 1980, set forth the following with respect to Willard Blair:

[10] See *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U.S. 368 (1974).

[11] I credit Phillips' testimony to the effect as set out.

Inasmuch as the President of the Union was the sole spokesman during the critical period on the morning of February 18, 1980, and inasmuch as the Grievant did not assume any role of leadership, there can be no finding that the Grievant instigated the unauthorized work stoppage.

At the same time it is observed as significant that the Grievant did not obey the back to work order of the superintendent and that he did join with the rest of the employees in the unauthorized work stoppage. At first glance it might appear that the Grievant's transgressions were no greater than those of any other employee who participated in the Wildcat Strike. However, an officer of a Local Union has a greater responsibility for observance of a No-Strike Rule than do the rank and file members. Thus, when the Grievant, as Chairman of the Mine committee, joined the walkout, he was lending the credibility of his office to that illicit action.

While the Grievant's actions did not constitute instigation of the Wildcat Strike, they do serve to establish an abrogation of his responsibility as a Local Union Officer and moreover, his refusal to obey the Superintendent's general back to work order, which was given to all of the employees, was in any event, an act of insubordination.

The record reveals that the nature of the Grievant's insubordination did not manifest itself in the form of a refusal of a direct personal order to return to work, but rather, that of a general order given to all of the employees present in the Bath House. When this fact is considered in view of the Grievant's thirty-two years of employment, which is absent disciplinary citation, and particularly in view of the finding *supra*, that he did not instigate the Wildcat Strike; it must be found that the penalty of discharge in this instance is too severe.

Accordingly, the Grievant's discharge is reduced to a thirty-day suspension for failure to exercise the authority of his office, and for failure to obey the back to work order.

Thus, the arbitrator reduced Blair's discharge to a suspension of 30 working days.

3. Neither the Union, Blair, nor Riggs appealed the March 12, 1980, arbitration decisions by aritrator Stoltenberg. On the same date, March 12, 1980, arbitrator Stoltenberg issued a decision upholding the discharge of Zemonick. In such decision Stoltenberg found that Zemonick had *instigated* the work stoppage on March 12, 1980. Such decision as to Zemonick was appealed, and the decision upholding Zemonick's discharge was sustained.[12]

[12] I note that Respondent apparently argued at the trial that the upholding by the review board of the Zemonick discharge reveals that the decisions by the arbitrator in the Blair and Riggs cases were correct. The comparisons do not necessarily follow. In one case, Zemonick's, the discharge was upheld because he *instigated* a work stoppage wherein the dispute could have been handled by the grievance and arbitration procedures. In the Blair and Riggs cases, discipline was imposed because of the individuals' *status* as union committeemen. In any event, the General Counsel did not proceed on Zemonick's case, and the General Counsel, pursuant to Sec. 3(d) of the Act, has final authority as to such decision. Such refusal to proceed is not reviewable by the Board. The General Counsel stated at the hearing that the General Counsel had decided that the arbitrator's decision in Zemonick's case warranted deferral and that the decisions in Blair's and Riggs' cases did not warrant deferral. Were it necessary to decide, it appears obvious that there is a distinction between the decision relating to Zemonick and the decisions relating to Blair and Riggs. Thus, as to Blair and Riggs, discipline was imposed because of Blair's and Riggs' membership on the Mine Committee. On the other hand, the arbitrator found that *Zemonick* had instigated the work stoppage, and discipline was upheld because of his actions in such regard.

E. *The Question of Deference to the Arbitration Decisions*

Respondent contends that the arbitration decisions concerning Blair and Riggs should be deferred to because they are not palpably wrong. The General Counsel contends that the said decisions should not be deferred to because said decisions are repugnant to the Act.

Under Board law it is clear that there is merit to the General Counsel's contentions. Thus, under Board law as expressed in *Precision Castings Company*, 233 NLRB 183 (1977), the arbitrator's upholding of discipline to be given to Blair and Riggs, based upon imposition of such discipline because one was chairman of the Union's Mine Committee and the other a member of such committee, constitutes a holding repugnant to the Act. As set forth by the Board in *Precision Castings*:

> The fact that the disciplined employees participated in an unauthorized strike in breach of a valid contract provision does not legitimize Respondent's action in this situation. Respondent's freedom to discipline anyone remained unfettered so long as the criteria employed were not union-related. In the case before us, however, Respondent admits that the reason for selecting these five employees for discipline was that each held the position of shop steward and, therefore, under the terms of the contract, could assertedly be held to a greater degree of accountability for participating in the strike. However, discrimination directed against an employee on the basis of his or her holding union office is contrary to the plain meaning of Section 8(a)(3) and would frustrate the policies of the Act if allowed to stand. Accordingly, we find Respondent's disciplinary action violative of Section 8(a)(3) and (1) of the Act. [233 NLRB at 183–184.]

I would note that the contractual provisions relating to the Mine Committee specifically limit the Mine Committee's authority. However, I do not find it necessary, because of the Board's holding in *Precision Castings*, to attach weight to such provision in determining that arbitration decisions as to Blair and Riggs should not be deferred to. Accordingly, it is concluded that the arbitration decisions in the Blair and Riggs cases should not be deferred to.[13]

[13] Respondent's real contention in this case is that Board law as expressed in *Precision Castings* and other cases of similar import is incorrect and that the correct law is as expressed in certain United States circuit court of appeals cases. I am bound by Board law in this matter. Further, with great respect for decisions of higher authorities, I am persuaded that the Board law as expressed in *Precision Castings* is correct and required by a clear reading of the Act. See also *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955); *The Union Fork and Hoe Company*, 241 NLRB 907 (1977); *Hammermill Paper Company*, 252 NLRB 1236 (1980).

F. *The Discriminatory Discharges; Conclusions*

The General Counsel contends that the imposition of discipline upon Blair and Riggs based upon the fact of their membership or position on the Union's Mine Committee constitutes discrimination within the meaning of Section 8(a)(3) and (1) of the Act. Both the General Counsel and Respondent appear to recognize the controlling Board law set forth in *Precision Castings, supra.* Respondent contends, however, that Board law as expressed in such cases is incorrect and that certain United States circuit court of appeals cases, which in effect refuse to go along with the Board as regards the *Precision Castings* principles, set forth the correct holdings. As indicated previously, I am bound by the Board law in *Precision Castings.* I also am persuaded that the Board's pronouncements in *Precision Castings* reveal a correct reading of clear statutory language.

Respondent appears to have presented evidence through Phillips designed to establish that the mine committeemen were leaders. It appears to me that the very nature of the responsibility of such positions would indicate that election by fellow employees or by appointment by others to such positions would indicate that such individuals holding such positions have leadership qualities and are considered as leaders.

There appears to be some distinction in the court cases cited by Respondent between identity as union officers or agents and the status of one holding such position. It appears that Respondent's arguments about such cases involve arguments about responsibilities flowing from such status and at the same time that such status connotes that the individuals are leaders or are acting as leaders to instigate an unlawful work stoppage if such individuals do not take actions to prevent such work stoppage. I am bound by the principles of the Board's decision in *Precision Castings.* As to Respondent's contentions, however, it appears to me that the contractual provisions *limit* the authority of the mine committeemen. This being so, I find it hard to envision any responsibility being placed on Blair or Riggs, the mine committeemen, to direct employees to go to work. Further, such provision would appear to negate the idea of leadership under such circumstances.[14]

Respondent also contends in effect that the Board's decisions concerning "superseniority" reveal that the prohibition of discriminatory discipline of union officers or agents involved in illegal work stoppages is an incorrect view of the law. On the other hand, perhaps some respondents might contend that the Board's decision in *Precision Castings* casts doubts upon the holdings in "superseniority" type cases.[15] I do not find it necessary in this Decision to discuss in detail whether the "superseniority" and *Precision Castings* type holdings are consistent or inconsistent. I would note that in the "superseniority" holdings the Board focuses upon the question of legitimacy of interests and the furtherance of stability and representation of employees. In the *Precision Castings* type of decision, the employer would appear normally to have recourse against the union in other proceedings, and thus there exists no legitimate need to discriminate against employees.

I am persuaded that Respondent is seeking the establishment of an *evidentiary* presumption that employees who are union officers or agents and who are present at the times of unauthorized or illegal work stoppages are deemed to be instigators or encouragers unless such officers or agents expressly take steps to prevent such work stoppages. As to this, I am persuaded that, if Congress had intended such presumption, it would have legislated such presumption. Since it has not done so, I am persuaded that Congress left the question of such presumption of evidence to the Board, the body set forth to administer the Act. Further, I am persuaded that such a presumption should not be established. There is no reason to believe that employees or others, who could be witnesses as to whether individuals instigate or encourage illegal work stoppages, will not testify, if called as witnesses, as truthfully as any other witnesses.

In *Precision Castings* the Board rejected an employer's contentions that union officers (under the terms of a contract) could be held to a higher degree of accountability for participating in a walkout in violation of a no-strike clause. As has been indicated, the Board asserted that the selection of employees for discipline on the basis of their positions as union officers was "discrimination" directed against an employee on the basis of his or her holding union office. Considering these principles, it is clear that the selection of Blair and Riggs for discipline because of their position as mine committeemen constitutes an act of discrimination.

In connection with the foregoing, it should be noted that the Board in *Metropolitan Edison Company,* 252 NLRB 1030 (1980), reiterated its *Precision Castings* doctrine. In such case there was discussion of the inequity in bargaining status which would follow if an employer were free to accord greater discipline to union officials when the union had no means of similar discipline to be imposed as a matter of self-help upon management officials. It would appear that this clear inequity, if such were allowed, would be persuasive to employees that holding union positions would be detrimental to their interests and thus discourage their activity in such regard.

In sum, the facts reveal that Respondent suspended Blair and Riggs on February 18, 1980, and discharged Blair and Riggs on February 20, 1980, because of their membership on the Union's Mine Committee.[16] Such conduct constitutes conduct violative of Section 8(a)(3) and (1) of the Act. It is so concluded and found.[17]

[14] I found it unnecessary to consider such provisions concerning limitations on the authority of the mine committeemen with respect to the question of deferral to the arbitration proceeding. As to the merits of this case, however, I find it proper to consider such provisions.

[15] Cf. *Dairylea Cooperative, Inc.*, 219 NLRB 656 (1975).

[16] In the case of illegal work stoppages, an employer does not have to discipline all employees who engage in the work stoppage. The gravamen of the offense in this case is the discriminatory imposition of discipline.

[17] *Precision Castings*, 233 NLRB 183; *Miller Brewing Company*, 254 NLRB 266 (1981). See also *Gould Corporation*, 237 NLRB 881 (1978), enforcement denied 612 F.2d 728 (3d Cir. 1979); and *Indiana & Michigan Electric Company*, 237 NLRB 226 (1978), enforcement denied 599 F.2d 227 (7th Cir. 1979).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It having been found that Respondent discharged Willard Blair, Jr., and Gary L. Riggs, in violation of Section 8(a)(3) and (1) of the Act, the recommended Order will provide that Respondent offer each reinstatement to his job, and make each whole for loss of earnings or other benefits within the meaning and in accord with the Board's Decisions in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977),[18] except as specifically modified by the wording of such recommended Order.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Consolidation Coal Company, the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Mine Workers of America, Local 4060, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Willard Blair, Jr., and Gary L. Riggs, Respondent has discouraged membership in a labor organization by discriminating in regard to tenure of employment, thereby engaging in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[19]

The Respondent, Consolidation Coal Company, its officers, agents, successors, and assigns, shall:

1. Cease and disist from:

(a) Discharging, or otherwise discriminating against, employees in regard to hire or tenure of employment, or any term or conditions of employment because of their union or protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer to Willard Blair, Jr., and Gary L. Riggs immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights previously enjoyed, and make each whole for any loss of pay or other benefits suffered by reason of the discrimination against each in the manner described above in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at Respondent's facility at Mine No. 20, Four States, West Virginia, copies of the attached notice marked "Appendix."[20] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's representatives, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[18] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[19] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[20] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."